SHOW PROCEEDINGS AND ORDERS DATE: [05/01/90]

CASE NBR: [89106484] CFH STATUS: [ ]
SHORT TITLE: [Granviel, Kenneth]
VERSUS [Texas] DATE DOCKETED: [122789]
PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Dec 27 1989		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jan 2 1990		Motion of petitioner Kenneth Granviel for leave to proceed in forma pauperis without an affidavit of indigency executed by the petitioner filed.
Jan 22 1990		Motion of petitioner Kenneth Granviel for leave to proceed in forma pauperis without an affidavit of indigency executed by the petitioner GRANTED.
Feb 28 1990		Order extending time to file response to petition until March 23, 1990.
Mar 26 1990		Brief of respondent Texas in opposition filed.
Apr 5 1990		DISTRIBUTED. April 20, 1990
Apr 18 1990		Record requested.
May 7 1990		Record filed.
May 9 1990		REDISTRIBUTED. May 24, 1990

Last page of docket

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CASE NBR: [89106484] CFH STATUS: [ ]
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PAGE: [02]

DATE	NOTE	PROCEEDINGS & ORDERS
May 29 1990		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

****

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

NO. 89-6484

ORIGINAL

KENNETH GRANVIEL
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

Supreme Court, U.S.
FILED
DEC 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

Petition for Writ of Certiorari To
The Court of Fifth Circuit Appeals in
New Orleans, Louisiana

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

RECEIVED
DEC 28 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

I. MAY THE STATE CONSTITUTIONALLY DEPRIVE AN ACCUSED OF THE OPPORTUNITY TO PRESENT MITIGATING EVIDENCE REBUTTING THE STATE'S ARGUMENT THAT THE DEATH PENALTY IS A DETERRENT TO CRIME IN ORDER TO CONVINCE THE JURY THAT THE DEATH PENALTY IS NOT APPROPRIATE AS APPLIED TO THIS PARTICULAR ACCUSED?

II. MAY THE PRESUMPTION OF CORRECTNESS BE APPLIED TO A TRIAL COURT'S DECISION TO EXCUSE A POTENTIAL JUROR IN ORDER TO AVOID AN INDEPENDENT ANALYSIS BY THE COURT OF APPEALS WHEN AN IMPROPER STANDARD HAS BEEN APPLIED BY THE TRIAL COURT?

III. MAY THE STATE REQUIRE AN INDIGENT DEFENDANT TO GIVE A COPY OF A PSYCHIATRIC EXAMINATION BUT NOT A NON-INDIGENT IN ORDER TO GET THE COURT-APPOINTED PSYCHIATRIST PAID FOR HIS SERVICES?

IV. MAY THE STATE CONSTITUTIONALLY ADMIT THE TESTIMONY OF THE SUPERVISING BAILIFF'S REGARDING ACTIONS THEY OBSERVED BETWEEN DEFENSE ATTORNEY'S AND CLIENT DURING PRIVATE CONSULTATIONS?

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NO. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

KENNETH GRANVIEL,
Petitioner

vs.

THE STATE OF TEXAS
Respondent

Petition For Writ of Certiorari To
The Texas Court of Fifth Circuit Appeals
At New Orleans, Louisiana

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the Fifth Circuit Court of Appeals at New Orleans, Louisiana entered in this case on August 28, 1989, a timely filed Motion for Rehearing was denied on September 28, 1989.

OPINIONS BELOW

Petitioner filed a Writ of Habeas Corpus in the United States District Court attacking the Constitutionality of the decision of the Texas Court of Criminal Appeals affirming Petitioner's Conviction and sentence of death. The opinion of the Texas Court of Criminal Appeals is published at 723 SW2d 141 (Tex.Crim.App., 1986). (Appendix A) The United States District Court issued its opinion denying relief on September 19, 1988. (Appendix B) A panel of the Fifth Circuit Court of Appeals issued an opinion affirming the District Court's denial of relief. The opinion of the Fifth Circuit Court of Appeals is attached as Appendix C. A

timely filed Motion for Rehearing was overruled on September 28, 1989 (Appendix D)

JURISDICTION

This Honorable Court has jurisdiction to review a final decision of a federal Court of Appeals pursuant to 28 USC 1257 and 28 USC 2101. In addition, Petitioner seeks leave to proceed in forma pauperis pursuant to 28 U.S.C. 1915(a) and Rule 46.1 of the Rules of the Supreme Court of the United States of America. Petitioner has been defended by court-appointed and volunteer counsel through out his trials and appeals since his arrest in 1975. Petitioner has been incarcerated continuously since his arrest in 1976. Petitioner was allowed to proceed in forma pauperis by both the District Court and the Court of Appeals.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America, which reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States of America, which reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States of America, which reads as follows in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. Section 2254 which reads as follows in pertinent part:

> §2254. State custody; remedies in Federal courts
> ...
> (d) In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was overwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency

> **of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:**

And in an evidentiary hearing in the proceeding the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

...

STATEMENT OF CASE

A. Course of Proceedings and Disposition Below.

Petitioner was convicted by a jury of the offense of Capital Murder and sentenced to death on May 5, 1983.

The Texas Court of Criminal Appeals affirmed the case on July 2, 1986. The United States District Court denied relief on Petitioner's Writ of Habeas on September 19, 1988. The Fifth Circuit Court of Appeals affirmed the denial of relief on August 28, 1989.

B. Statement of Facts.

This case involves a retrial of a Capital Murder indictment charging Petitioner with the murder of Laura McClendon while in the course of committing and attempting to commit the offense of aggravated rape. The evidence at trial showed that Petitioner was riding around in his car on the evening of October 7, 1974, when he got an urge to have sex with Laura McClendon. he went to her apartment and went inside. While she was cleaning the kitchen, he

put a bone-handled steak knife to her throat. When he directed her toward the bedroom, Laura told him he didn't have to take it, meaning rape her, so Petitioner put the knife back in his pocket and they walked together into her bedroom. Her young son was with them. Petitioner told her to tie the boy up because he was crying. She followed Petitioner's instructions, but instead of putting Steven in the closet as told, she put him on the bed. Petitioner tied Laura up and gagged her. Then three female relatives came into the apartment. Petitioner tied the three women up. Petitioner then moved his car, and went back into the apartment. petitioner then took Laura to the back bedroom, pulled her pants down to her ankles, and then took the knife to cut off the panties. The little boy started crying so Petitioner put him in the closet. Laura told Petitioner that she and her little boy had asthma and asked for some medicine. Petitioner gave them the medicine and then had sexual intercourse with Laura. After the intercourse, they talked for about any hour. The little boy started crying so Petitioner stabbed him. Then Petitioner went to the back bedroom and sat down with Laura for awhile. Later he cut and raped one of the other women. One of the other women, Linda, was not breathing and so he stabbed her. Petitioner then went back to Laura and sat and talked for awhile. Petitioner then stabbed Laura and one other woman. He asked her if she was dead and when she said "no" he stabbed her a few more times. Then he went through the women's purses and took the money. (R.,LVI, 514-517)

On February 8, 1975, Petitioner killed another woman.

At 9:45 p.m. on February 8, 1975, Reverend R.L. Spearman pastor of the Pilgrim Galilee Baptist Church received a telephone call from Petitioner. (R., XXXIX, p. 406) Petitioner said he was going to give himself up because he was tired of killing. (R., XXXIX, p. 406) Reverend Spearman invited Petitioner to his house, and when Petitioner arrived, they left for the police station. (R., XXXIX, p. 407-408) When they arrived at the police station,

Reverend Spearman and Petitioner were separated briefly. (R., XXXIX, p. 437) Petitioner was questioned by police and gave both an oral and written confession. Petitioner was first convicted of the offense of capital murder in this case in 1975. Petitioner's conviction wa affirmed by the Texas Court of Criminal Appeals on November 10, 1976 and certiorari was denied on May 23, 1977. **Granviel v. State**, 552 SW2d 107 (Tex.Crim.App., 1976); cert. denied 431 US 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977). Petitioner's first conviction was finally reversed on jury selection error by the Fifth Circuit Court of Appeals. **Granviel v. Estelle**, 655 F2d 673 (5th Cir., 1981).

Petitioner was convicted of capital murder and sentenced to death this second time on May 5, 1983.

REASONS FOR GRANTING THE WRIT

There are special and important reason for granting the writ. The questions of whether or not a defendant may offer evidence that the death penalty as applied to this particular defendant is appropriate when that evidence is not directly related to the defendant or his crime should be addressed by this Honorable Court. An attack on the propriety, effectiveness, or morality of the death penalty should be admissible to show that the death penalty is not appropriate for this defendant. Such evidence would not elongate the trial unnecessarily. If several weeks are devoted to jury selection alone, then another day or two for mitigating evidence attacking the propriety of the death penalty is only rational.

Another special and important reason for granting the writ is the Court of Appeals application of the presumption of correctness to the ruling of the trial court in excusing Reverend Curry as a prospective juror when the trial court was applying the wrong standard for determining his qualifications as a juror. Reverend Curry said the magic words to disqualify himself under **Witherspoon v. Illinois**, 391 US 510 but also emphatically affirmed that he could and would follow the law despite his convictions against the

death penalty making him qualified under **Wainwright v. Witt**, 469 US 412. This Honorable Court has not directly addressed this issue previously.

A third special and important reason for granting the writ is the decision by the Fifth Circuit Court of Appeals that the Texas rule requiring an indigent to provide a copy of the psychiatric examination to the State in order to get the expert paid is Constitutional. Are the requirements of **Ake v. Oklahoma**, 470 U.S. 68 at p. 84,84 L.Ed. 2d 53, 105 S.Ct. 1087 (1985) satisfied by forcing an accused to choose between seeking psychiatric expert assistance in preparing for trial and thereby possibly giving the State damaging punishment evidence if the exam is not entirely favorable or to forego an investigation into the possible defense in order to avoid giving the State such evidence?

The fourth and final reason for granting the writ is to allow this Honorable Court to address the issue of allowing the bailiffs who are in charge of the jury to testify to matters they observed while watching the Petitioner and his attorneys during the attorney/client conference. There was no evidence of violence by Petitioner during his incarceration until the alleged slapping incident with his attorneys. The attorney at that point becomes a witness against his client, whether or not he testifies.

I.

IT IS A VIOLATION OF DUE PROCESS OF LAW TO EXCLUDE EXCULPATORY EVIDENCE THAT THE DEATH PENALTY HAS NO DETERRENT EFFECT ON CRIME.

The Fifth Circuit Court of Appeals has relied upon a plurality opinion of this Honorable Court that held that "evidence that does not bear on the defendant's character, record, or crime may be properly excluded by the trial court." **Granviel v. Lynaugh**, 88-1818 p. 5488; **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). This reasoning ignores the fact that the Petitioner may very well be able to argue that the death penalty should not be applied specifically objectives of the penal code

will not be served by killing the Petitioner. Texas law clearly provides that in the punishment phase of a capital murder case, "...evidence may be presented as to any matter that the court deems relevant to sentence." **Texas Code of Criminal Procedure, Art.** 37.071. The Texas Legislature has announced in Section 1.02 that one of the three objectives of the **Texas Penal Code** is "the deterrent influence of the penalties hereinafter provided." The State of Texas has prevented the Appellant from presenting evidence to show that his execution will not accomplish one of the primary goals of punishment announced by the Texas Legislature. To my knowledge and from the indications of the Appellee's brief and the Court of Appeal's opinion, no other case has directly addressed the issue of whether or not a defendant can attack the propriety of the death penalty as applied to him by showing the fallacies attached to the death penalty. If allowed, Preachers can testify to the immorality of the death penalty, historians can testify that the death penalty as applied in England was ineffective in preventing pickpockets from exercising their trade at the public hangings for pickpockets, and statisticians can testify to the fallacy that the death penalty deters crime because statistics show that in fact capital filings not only did not decrease after the execution of **CHARLIE BROOKS** in Texas but rather the filings seem to have increased slightly., a man is fighting for his life and the State is taking away crucial evidence that the reason for killing the defendant is not a valid reason but a misconception. Justice White noted that it would be a violation of the Eighth Amendment to execute someone who did not intend the death of the victim since it would be not only grossly out of proportion to the severity of the crime, but also because it also failed significantly to contribute to any perceptible goals of punishment. **Lockett v. Ohio**, 438 US 586 at 623; 57 L.Ed2d 973 at 1001; 98 S.Ct. 2954. This dissent by Justice White would certainly seem to make the tendered evidence relevant to a capital case. Statistics have been

recognized by the federal courts as valid evidence in employment discrimination cases. see **Watson v. Ft. Worth Bank & Trust**, 487 US____,101 L.Ed 2d 827 at 843; 108 S.Ct. ___ (1988). If statistics are valid evidence to show discrimination in employment, why cannot statistics be used to demonstrate to the jury why the death penalty should not be inflicted on this particular defendant. Justice O'Connor noted in **California v. Ramos**, 463 U.S. 992 at 1008' 77 L.Ed2d 1171 at 1185; 103 S.Ct. 3446 (1983) that "once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment." The jury considers countless factors in deciding whether death is the appropriate punishment for this particular defendant. **California v. Ramos**, supra at p. 1008. Since deterrence is one of the strongest arguments for the death penalty, a defendant should be allowed to show that that argument is false. This Honorable Court should hold that such evidence is admissible.

The Texas Court of Criminal Appeals had no problem or objection to the sufficiency of the study or the character of the evidence but merely held that the evidence was irrelevant under the Texas Capital sentencing scheme. If it is irrelevant, then the statue is unconstitutional.

II.

IT IS A DENIAL OF DUE PROCESS OF LAW TO EXCLUDE A JUROR BECAUSE OF HIS VIEWS ON THE DEATH PENALTY IF HE CAN FOLLOW THE LAW DESPITE HIS FEELINGS AND THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN APPLYING THE PRESUMPTION OF CORRECTNESS TO THE TRIAL COURT'S DECISION.

The Fifth Circuit Court of Appeals has decided that the trial court was properly acting under the tenets of **Wainwright v. Witt**, 469 US 454 when the case law in effect at the time of the trial was universally understood to be **Witherspoon v. Illinois**, 391 US 510 and the trial judge, as demonstrated by his questioning and his

actions was operating under and being guided by **Witherspoon**. It is equally obvious that the trial judge was acting extremely conservatively in granting challenge for cause. During questioning by the State, Reverend Curry admitted that he had some religious, conscientious or moral objections to the imposition of death as a punishment for crime. (R., XVI-852) He further admitted that "I have strong convictions against capital punishment." (R., XVI-853) He further stated that he would vote against capital punishment regardless of what the facts might show in the case. (R., XVI-854) Reverend Curry clearly showed, however, that despite his opposition to the death penalty, he was fully capable of setting aside his opinions and following existing law and the instructions of the trial court. The State copiously explained the juror's duty under the law to consider the two or three questions asked him and his duty to answer them based upon the law and the evidence. (R., XVI-585-862) After agreeing that he could answer all the questions truthfully based upon the law and the evidence and after reaffirming that he would, in the abstract, vote against the death penalty regardless of the facts shown on the trial of the case, the following interchange occurred:

> Q. All right.
> Now, is what you're telling the judge, then that even if you were convinced beyond a reasonable doubt, for example, that the defendant acted deliberately and there was a reasonable expectation that this actions would result in the death of another, that you might answer no to that questions when in fact in your heart you knew the answer was yes?
>
> A. Oh, no, I wouldn't do that. I wouldn't lie about it.
>
> Q. All right.
> Well, this is--you would answer the question truthfully?
>
> A. Truthfully, that's right.
> Q. All right.
> Now, the second question is--we're talking about whether there's a probability he would commit criminal acts of violence?
>
> A. Un-huh.
>
> Q. All right.
> Let's assume the situation where you had been

> convinced beyond a reasonable doubt, whatever evidence is required to show you that proposition is true, and, you know, there are some people in our society that continue to commit crimes day after day. If you were convinced of that beyond a reasonable doubt, could you answer yes to that knowing that you have already answered yes t the first question and knowing that the two yes answers just---
>
> A. Two yes answers would give him---
>
> Q. ---give him the death penalty?
>
> A. ---death penalty.
>
> Q. Could you do that?
>
> A. I would answer it truthfully if I was on the jury, yes.
>
> Q. You could do that?
>
> A. Yes,

Juror Curry was clearly and unambiguously affirming the fact that he could set aside this feelings about the death penalty and follow the law as given to him by the trial court and answer the questions truthfully based upon the law and the evidence. The law does not require, and due process of law does not allow, one to be tried by a jury composed solely of persons who strongly advocate death as a proper punishment for crime and of persons to whom "it won't matter...whether death results or not." (R., XVI-863) Reverend Curry was very honest and open about his feelings and his ability to set those feelings aside, the required oath, and answers the questions truthfully even knowing that the death penalty would result. (R., XVI-864-866) The State injected the requirements of 12.31(b) of the **TEXAS PENAL CODE** into the trial with the following questions:

> Q. Okay, so if you take that oath, then you're telling--I guess what you are telling us know is that even though you're--you're adamant in you opposition of the death penalty, if you take an oath to render a true verdict, then you will render a true verdict and it won't matter to you whether death results or not" (R., XVI-863)

Even in response to that question, Reverend Curry reaffirmed his ability truthfully to answer the questions and, therefore, he

could not be disqualified on the grounds of his opposition to the death penalty without violating **Witherspoon** and the State then attempted to convince him not to take the oath as a juror. At first, the State conceded and obtained the concession from the juror that he simply did not "want to be a part of this because of the feelings you have about the death penalty" and thereafter proceeded to suggest a way out of the situation as follows:

> A. That's right. I'm liable to be put in the position by telling the truth of what I have heard and what I understand that would transpire as a juror would place me in this position that I couldn't--I would have to go against what I believe, staunchly believe in, and that I would demand then that he be given capital punishment and whatever you said it was, an injection or something, lethal injection, and I don't want to be placed in that position.
>
> Q. Well---
>
> A. Because I will not lie about it.
>
> Q. All right.
> Well, now, you know, no one can--can force you to take an oath as a juror?
>
> A. I know.
>
> Q. Are you telling the Court, then, that you would not take the oath as a juror
>
> A. Oh, no. I can take--as long as it's before a magistrate I can take an oath.
>
> Q. All right, but once---
>
> A. I have already taken two.
>
> Q. But once--but we're talking about the oath that says you'll give a true verdict in a death penalty case?
>
> A. That's right. If I took oath that's what I would do.
>
> Q. All right.
> Would you take the oath becomes the question?
>
> A. No, because it's going to place me in uncompromising position.
>
> MR. HILL: Your Honor, we're raise the same objection we raised earlier regarding the Motion in Limine Three.
>
> THE COURT: Overruled.
>
> BY MR. BAYS:

> Q. You would refuse to take the oath:
>
> A. If it's going to place me in a position that I can't get out of, of--that would make me go against my own conscience." (R., XVI-864-865)

But the State even after all their prodding could not get Reverend Curry to refuse to take the oath. When asked if he would block the evidence out of his mind and vote for straight murder to avoid the capital murder dilemma, Reverend Curry stated, "Not if I took that oath." (R., XVI-870) Although a juror may find it hard or unpleasant to vote for capital punishment, that timidity does not disqualify a person from serving on a capital case. Hopefully, anyone who sits on a jury would find it hard to take a person's life. Unlike the jurors in **Lockett v. Ohio**, 438 U.S. 586 at 595-596; 57 L.Ed2d 973, at 983-984; 98 S.Ct.2954 (1978), Reverend Curry did not make "it unmistakably clear' that they [he] could not be trusted to 'abide by existing law' and to follow conscientiously the instructions' of the trial judge." **Lockett v. Ohio**, supra at 596; **Boulden v. Holman**, 394 U.S. 478 at 484, 22 L.Ed.2d 433; 89 S.Ct. 1138 (1969). In fact, Reverend Curry adamantly maintained that he could and would follow his oath and answer the questions submitted to him according to the law and the evidence., Appellant contends that Reverend Curry is the exact type of juror referred to by the **United States Supreme Court** in **Adams v. Texas**, 448 U.S. 38, 65 L.Ed.2d 581, 100 S.Ct. 2521 (1980) when the Supreme Court stated that "a **Texas** juror's views about the death penalty might influence the manner in which he performs his role but without exceeding the `guide jury discretion,' 577 SW2d at 730, permitted him under **Texas** law." **Adams v. Texas**, supra at 46-47. Appellant hardily contends that although he may be irrevocably predisposed to vote against the death penalty, if he is able to conscientiously exercise his "guided jury discretion" he is clearly qualified to sit as a juror on a capital punishment case in **Texas.**

The exclusion of Reverend Curry under a challenge for cause which states "at the time we would submit Reverend Curry understand

(sic) **Witherspoon v. Illinois**" was clearly error. His exclusion caused Appellant's jury to fall "woefully short of that unpartiality to which" he was entitled and in so doing the State" crossed the line of neutrality' and produced a jury uncommonly willing to condemn a man to die." **Adams v. Texas**, supra at 43-44. If the trial judge had been aware of the new standard announced by **Witt**, then he would not have granted the challenge for cause. The Fifth Circuit Court of Appeals has gone even further than this Honorable Court allowed in **Witt** in its holding that the trial judge acted properly in excusing the juror because he was placed in a dilemma due to the Texas death penalty procedure. A defendant cannot constitutionally in a death penalty case be deprived of a sympathetic juror simply because it causes him a dilemma to have to sit on the jury. Reverend Curry is exactly the type of juror contemplated by the United States Supreme Court in **Boulden v. Holman**, 394 US 478 at 484; 22 L.Ed. 2d 433 at 439; 89 S.Ct. 1138 (1969) where the Supreme Court held that a juror is not disqualified if despite his opposition to the death penalty and despite his fixed opinions against capital punishment, the juror would be willing to set aside his opinions and be "able as a juror to abide by existing law--to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." No one can deny that Reverend Curry was truthful, honest, and fully able to follow the law and answer the questions truthfully despite his opposition to the death penalty. This Court's holding that he can be properly excused is in direct violation of the Supreme Court holdings in both **Witt** and **Boulden v. Holman**. It was not an appropriate solution to deprive the Appellant of a fair cross-section of the community and to deprive him of a qualified juror whose views and arguments may have saved his life. The Constitution of the United States, under the due process provisions of both the Fifth and Fourteenth Amendments, does not authorize the State to go to trial

with a stacked deck consisting only of cold, uncompassionate, unfeeling jurors ready and even eager to kill. This Honorable Court should examine this holding by the Court of Appeals because it is wrong.

III.

IT IS A DENIAL OF DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL BY THE STATE TRIAL COURTS' ACTION IN REQUIRING THE DEFENSE PSYCHIATRIST TO GIVE THE STATE A COPY OF HIS EXAMINATION OF PETITIONER.

Every criminal defendant is entitled to the effective assistance of counsel. **UNITED STATES CONSTITUTION**, Fifth, Sixth, and Fourteenth Amendments. Due process requires the assistance in preparation at least at the sentencing phase of a capital trial of psychiatric testimony. **Ake v. Oklahoma**, 470 U.S. 68 at p. 84; 84 L.Ed.2d 53, 105 S.Ct. 1087 (1985)

An individual who can pay for his own psychiatrists does not have to reveal the nature of the reports and findings of his expert witness to the State unless he wishes to call that expert at the time of trial. Under the State of the law as sanctioned by the Fifth Circuit Court of Appeals, an indigent defendant must risk the possibility to have his statements to the expert later be used to kill him or forego his investigation into a very viable defense. The Fifth Circuit Court of Appeals decision to allow the involuntary disclosure of expert reports in effect gives the State a powerful tool to kill an indigent that it does not have with regards to non-indigent, monied defendants. Monied defendants are entitled to private, confidential experts; indigents are not and that distinction flies in the face of this Honorable Court's holding in **Ake v. Oklahoma**, 470 US 68. The Court of Appeals has apparently misinterpreted the arguments of the Appellant. The Appellant simply argues that he should have been provided the same opportunity to check his mental competence before standing trial without the threat of having the results of the investigative examination made available to the State to be used to kill him.

If an indigent defendant is entitled to defense experts to assist him in preparing for trial as **Ake** holds, then those defense experts should be clothed with the same privilege of confidentiality as is available in the attorney/client relationship. To hold that the defense experts must provide the State with all reports gives the State the advantage in an indigency case of being able to spy into the defense strategy and attorney work product in trial. Due process does not allow such a distinction based upon the fact that one is poor and another is not.

IV.

IT IS A DENIAL OF DUE PROCESS OF LAW TO ALLOW THE STATE TO PRESENT TESTIMONY FROM THE BAILIFFS LOOKING AFTER THE JURORS REGARDING THE ACTIONS OF THE PETITIONER WHILE HE WAS HAVING A PRIVATE AND CONFIDENTIAL CONVERSATION WITH HIS ATTORNEY.

An accused is entitled to the effective assistance of counsel. **SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.** In addition, an accused is entitled to due process of law including the right to consult effectively with counsel. **FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.**

The State called bailiffs Basil Honeycutt and Harry Millerd to testify concerning exchanges between Petitioner and his court-appointed attorneys they overheard and observed in the course of their employment with the Sheriff's Department as bailiffs. (R., Vol. 46, p. 1613-1614) Petitioner was in custody of the Tarrant County Sheriff during the entire period of time from his arrest of the present. Petitioner objected to the testimony of the bailiffs and asked that their testimony be suppressed. The objection and request were denied. (R., Vol. 46, p. 1616 and 1623) The trial court did instruct them that they were not to testify to any conversations between Petitioner and his attorneys.

Honeycutt testified to the jury that he was present in the holdover area when Petitioner and his two defense lawyers were present. At that time, he saw Petitioner slap one of the defense lawyers. (R., Vol. 46, p. 1619) No one else was present in the

area except Petitioner, his two lawyers, and the bailiff. (R., Vol. 46, p. 1620)

Millerd testified he was peeking through the little glass window in the door to the holdover area while Petitioner was conferring with defense counsel. (R., Vol. 46, p. 1626) Millerd claimed he saw Petitioner reach through the bars and grab one of his lawyers by the "tie area." (R., Vol. 46 p. 1627) Millerd then admitted he could not tell "how good a hold he got on it because once I seen him reach through the bars, I went to open and I didn't see `till I got the door open, and they were coming out then." (R., Vol. 46, p. 1627) Millerd guessed this occurred during voir dire of the jury. On cross-examination, Millerd was forced to admit he really could not tell exactly whether it was his tie or coat, but he could see some pulling. (R., Vol. 46, p. 1628) Both Millerd and Honeycutt testified they were attendant on the jury during the period the jury was sequestered. (R., Vol. 46, p. 1611-1612 and p. 1628) This testimony was offered on the issue of future dangerousness during the punishment phase of the trial.

The Appellant was in custody for the entire period from his initial arrest on the charges. The only time and the only place that Appellant could consult with counsel was in the holdover cells of the Tarrant County jail. By allowing the bailiffs to testify to the slapping incident in effect turned Appellant's Counsel into witnesses against him. The record is devoid of any communications between Appellant and counsel is left without a response t the testimony. Appellant either slapped counsel unjustifiably, in which case the State has an argument that Appellant is still a person likely to commit unprovoked acts of violence in the future, or counsel must explain that he either provoked the slapping incident or that it was an explanation of what happened, in the crime, in which case counsel has decreased his own stature and believability before the jury and helped destroy the insanity defense. Either way, Appellant is deprived of the effective

assistance of counsel. The bailiffs, who are court personnel are clearly incompetent witnesses. The fact that a prisoner has adjusted well to prison life and there have been no acts of violence during his imprisonment is an issue for consideration by the trier of fact in the punishment phase of a capital murder trial. **Skipper v. South Carolina**, 476 U.S. 1, 90 L. Ed.2 1, 106 S.Ct. 1669 (1986) The admission of the bailiff's testimony is the equivalent of secretly video taping attorney/client conferences and taking the tapes and playing them for the jury to show that the defendant looks guilty when talking to his lawyer. Such behavior on the part of the State deprives Appellant of any semblance of due process of law or the effective assistance of counsel.

CONCLUSION AND PRAYER

Petitioner prays this Honorable Court to grant his application for writ of certiorari to the Fifth Circuit Court of Appeals in order to review this error.

For the reasons stated herein, petitioner alleges that there are special and important reasons for this Honorable Court to consider the issues presented herein.

Accordingly, Petitioner respectfully prays that the petition for certiorari to the Fifth Circuit Court of Appeal at New Orleans, Louisiana issue immediately.

Respectfully submitted,

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Appendix A

[redacted]

Kenneth GRANVIEL, Appellant,

v.

The STATE of Texas, Appellee.

No. 69177.

Court of Criminal Appeals of Texas, En Banc.

July 2, 1986.

Defendant was convicted in the 213th Judicial District Court, Tarrant County, Tom Cave, J., of capital murder, and he appealed. The Court of Criminal Appeals, Tom G. Davis, J., held that: (1) evidence was sufficient to prove aggravating offense of aggravated rape; (2) defendant's expression during interrogation of his desire to ask a legal question did not constitute invocation of right to counsel; (3) testimony of three veniremen reflected adequate basis upon which to conclude that their views concerning death penalty would prevent or substantially impair performance of their duties; and (4) administration to jurors of oath required in capital murder case did not prevent jurors from exercising their discretion to consider all mitigating evidence.

Affirmed.

Clinton, J., filed dissenting opinion in which Teague, J., joined.

1. **Homicide** ⇐354

Defendant's admission that he raped victim was sufficient to prove aggravated rape as aggravating offense in capital murder trial. V.T.C.A., Penal Code § 19.03(a)(2).

2. **Criminal Law** ⇐517.2(2)

Defendant did not trigger his Fifth Amendment right to counsel by stating that he would like to ask legal question prior to giving second confession, where confession was volunteered. U.S.C.A. Const.Amend. 5.

3. **Criminal Law** ⇐517.2(1)

Assuming that defendant's statement that he would like to ask a legal question invoked his right to counsel prior to his second confession, such right was not violated when defendant gave subsequent confession, where defendant reinitiated communication with police and was not interrogated. U.S.C.A. Const.Amends. 5, 6.

4. **Criminal Law** ⇐1192

Under doctrine of "law of the case," determination on appeal that psychiatrist's testimony at defendant's first trial on issue of defendant's sanity at time of offense was admissible governed on retrial.

5. **Criminal Law** ⇐1180, 1192

Under doctrine of "the law of the case," where determinations as to questions of law have already been made on prior appeal to court of last resort, those determinations will be held to govern case through all of its subsequent stages, including retrial and subsequent appeal.

6. **Criminal Law** ⇐486(6)

Psychiatrist's testimony at guilt-innocence phase of defendant's trial on issue of his sanity at time of offense was not rendered inadmissible on ground that it was based on result of test which had not been conducted under psychiatrist's supervision or control, where psychiatrist's testimony was based on information received while talking with defendant on two occasions.

7. **Criminal Law** ⇐412.2(3)

Miranda warnings were not required prior to psychiatrist's interviews of defendant to determine his competency to stand trial and sanity at time of offense, where interviews were requested by defense counsel, and defense counsel was present during interviews. U.S.C.A. Const.Amend. 5.

8. **Criminal Law** ⇐662.60

Admission of psychiatrist's transcribed testimony at defendant's second trial did not deny defendant his right to confront and cross-examine witnesses against him, where defendant was represented at first trial by counsel who cross-examined psychiatrist, and transcript of testimony admitted

[redacted]

at second trial included the cross-examination. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐577.9

Criminal action commenced for purposes of Speedy Trial Act on date federal district court conditionally granted writ of habeas corpus by giving state option of releasing defendant or retrying him. Vernon's Ann.Texas C.C.P. art. 32A.02.

10. Criminal Law ⇐577.16(7)

When accused files motion to dismiss under Speedy Trial Act, before applicable time period has expired, based on State's failure to announce ready for trial within applicable time period, motion is premature and should be denied. Vernon's Ann.Texas C.C.P. art. 32A.02.

11. Criminal Law ⇐577.10(5)

Defendant's constitutional right to speedy trial in capital murder case was not violated by State's failure to try him or announce ready for trial on other indictments arising out of same transaction. U.S.C.A. Const.Amends. 6, 14.

12. Jury ⇐108

In capital murder trial, testimony of three veniremen reflected adequate basis upon which to conclude that their views concerning death penalty would prevent or substantially impair performance of their duties in accordance with their instructions and oath.

13. Jury ⇐148(4)

Administration to jurors of oath required in capital murder case, that mandatory penalty of death or life imprisonment would not affect deliberations, did not prevent jurors from exercising their discretion to consider all mitigating evidence in determining whether to assess death penalty, where jurors were not required to take oath as condition of service on the jury. V.T.C.A., Penal Code § 12.31(b).

14. Jury ⇐148(4)

Oath required to be given to jurors in capital murder case does not unconstitutionally deny jurors freedom to deliberate and decide issues of fact in a capital case. V.T.C.A., Penal Code § 12.31(b).

15. Criminal Law ⇐1206.1(6)

Evidence concerning effectiveness of death penalty as instrument of social policy was not relevant to special issues of capital punishment proceeding. Vernon's Ann. Texas C.C.P. art. 37.071(a).

16. Witnesses ⇐281(1)

Defendant's acts of slapping and grabbing his attorney while in private conference did not constitute communications protected by attorney-client privilege, so that evidence concerning the incidents was admissible in punishment phase of capital murder trial.

17. Homicide ⇐343

Even assuming that bailiffs were not competent to testify during punishment phase of capital murder trial regarding incidents in which defendant slapped and grabbed his attorneys, admission of such testimony was harmless error, where evidence of defendant's prior rapes was admitted.

18. Criminal Law ⇐829(22)

Trial court was not required to apply law to facts of aggravating offense of aggravated rape in capital murder trial where court instructed in the abstract on elements of offense of aggravated rape.

Lee Ann Dauphinot, Danny D. Burns, Fort Worth, for appellant.

Tim Curry, Dist. Atty., and C. Chris Marshall, David L. Richards and Greg Pipes, Asst. Dist. Attys., Fort Worth, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

TOM G. DAVIS, Judge.

Appeal is taken from a conviction for capital murder. V.T.C.A. Penal Code, Sec. 19.03(a)(2). After finding appellant guilty, the jury returned affirmative findings to the special issues under Art. 37.071(b), V.A. C.C.P. Punishment was assessed at death.

[1] Appellant contends that the evidence is insufficient to prove the aggravating offense of aggravated rape. Appellant argues as follows:

"The only evidence of the circumstances of the sexual intercourse was Appellant's statement. According to the statement, the intercourse was consensual and the murder came later. Since the State offered the statement which admitted guilt but contained exculpatory statements, it was bound to disprove the exculpatory portions which would change the offense from capital murder to murder. *Pulafox v. State*, 608 S.W.2d 177 (Tex.Cr.App. 1980). The State, therefore, did not sustain the burden of proving aggravated rape as set out in Sec. 21.02 and 21.03 of Tex.Penal Code and reversal is required."

We have set out appellant's confession in the footnote.[1] Appellant claims that his

1. "... I went and got in my blue olds 88 and drove around the McClendon girls' apartments. I knew all of the McClendon girls. ... While I was driving around the block I got this urge to have sex with Laura McClendon. I haven't even had sex with her before. I stopped and backed my car up to their apartment. I sat there in the car a few minutes. They had the living room curtains open and I could see Laura inside. I don't remember what time it was but it was sometime around 10:00 P.M. I went to the apartment and the front door was open. I stuck my head inside and knocked. Then Laura come around the corner from the kitchen and said 'Come on in.'. I sit down on the couch. We exchanged a few words and then I asked her for a drink of water. By then all I wanted to do was drink the water and leave, but I didn't. I took the glass back in the kitchen. She was wiping off the stove and the little boy, Steven was over by the kitchen table playing. I had a bone handle stake knife with me. I had brought the knife with me. I walked up behind Laura while she was cleaning the stove and put the knife to her throat. She laughed and thought I was playing. I told her to turn around that I wasn't kidding. I told her to smile and to put her arms around me so little Steven wouldn't get frightened. Then I told her to get Steven's hand and we started walking to her bedroom. It is the first bedroom in the right. I told her and Steven to stop right there and I went and locked the front door and closed the curtains. *That is when Laura told me I didn't have to take it, she meant rape her.* I put the knife in my back pocket and we went into her bedroom. Steven was still with us. I told Laura that I would have to tie Steven up because he sensed something was wrong and started crying. Then I pulled the phone cord from the phone. I gave it to Laura and told her to tie him up. She tied Steven up and I think she tied his hands behind him. I told her to put him in the closet but she didn't, she sit him on the bed. Then I tied her up. It took the sheet off of Laura's bed and I cut and tore a piece off of the sheet and tied Laura up and gagged her. Then I layed both of them face down on the bed. That when Linda, Motasha and Martha McClendon came in. I was still in Laura's bedroom when they came in. I stood up beside the closet and the door to the bedroom was shut. I heard Martha say 'Where is Laura?' By then Matasha came in the room. I just made a move and she saw me and she ran back out of the room. At that time Martha went into the bathroom. Matasha didn't say anything, she just ran into the bathroom with Martha. I took the bedspread and threw it over Laura and Steven then Linda came into the room. I moved back beside the closet and when Linda came in the bedroom I showed her the knife and told her to lay down beside Laura. Then I shut the door. By then Martha came out of the bathroom and went to the living room. I can't remember where Matasha was at that time. I walked in the living room and Martha was looking out the window. Then she closed the curtain. I walked up behind her and grabbed her and threw her on her head and she asked me what was wrong. I told her to get up and I put the knife to her throat and took her to her bedroom. That is the back bedroom. I think I used her sheets off her bed to tie her up with. I drug her back into the front bedroom where Linda and Laura was. Matasha was already in there too. I tied up Matasha but I can't remember what with. After I tied them all up and gagged them all and I left went outside and got in my car. I moved my car around the street by the pool and backed it in. I got out and walked back through the opening to their apartment. I went back in the apartment. I went back to Laura's bedroom and all five of them were still in the room. I took Laura to the back bedroom and pulled her pants down to her ankles and I got a little excited and I took the knife and when I started to cut the panties off the knife went in and cut her in the inside the thigh. I don't remember if I cut the panties off or pulled them down. Then little Steven started crying and I went and put him on a trunk in the closet of Laura's room. I went back in the back bedroom with Laura and she kept trying to mumble something. I went ahead and took the gag off Laura and she told me that she and Steven had asthma and there was some medicine on the dresser. I went and got it and gave it to her and took her in to where Steven

statement "that is when Laura told me I didn't have to take it, she meant rape her and I put the knife back in my pocket and we went into her bedroom", is exculpatory, in that it negates lack of consent to the intercourse. If Laura McClendon did speak the words appellant claims she did, and with the purpose appellant attributes to them, appellant's confession shows that she spoke them early in her encounter with appellant, and not at the time of the intercourse. Many events intervened between her remark and the intercourse. Concerning the intercourse, appellant states, "I took Laura back in the back room. *I raped her* then we sit there and talked for about an hour." [our emphasis.]

The confession contains no exculpatory matter. At the point when consent is an issue, that is, at the time of the intercourse, appellant's confession states that he raped the victim; in other words, that the intercourse was without the victim's consent. The rule of *Pulafox* therefore does not apply. Ground of error number thirteen is overruled.

[2] In his fifth ground of error appellant contends that the trial court erred in admitting his confession over objection that it was obtained in violation of appellant's right to counsel. The record reflects that the trial court held a *Jackson v. Denno* hearing on the voluntariness of the confession. The trial court found that the confession was made voluntarily, and that appellant had waived his right to counsel. The court overruled the objection.

The record of the hearing reflects that on the night of February 8, 1975, at 10:11 p.m., appellant went to the Fort Worth police station, accompanied by a Rev. Spearman. Officer Raulston testified that he was on duty that night. Raulston testified that the two men came into the station together, and that Rev. Spearman introduced appellant to Raulston. Appellant stated that he wanted to talk to a homicide investigator. Raulston told appellant that he was one, and appellant "asked if there was someplace that we could talk privately." Raulston then escorted the two men to an office in the homicide section and closed the door.

Raulston testified to the sequel as follows:

"A. Reverend Spearman sat down at the table; Kenneth advised me, he says, you better sit down, I'm going to give you the shock of your life; and I asked him, I said, I don't understand what you're talking about, and he reached into his pocket and removed a pistol and laid it on the table, and then he reached in his pocket and pulled out a butcher knife and laid it on the table, and then he says, now do you understand what I'm talking about, and I said, not really; it's beginning to be a little clearer.

"Q Let me ask you this: Was it in fact becoming clearer to you? Did you have any idea what this was about?

"A. My idea at that time was that some sort of violence had occurred. He said then that he wanted to confess to the Riverside Village Apartment murders."

Raulston testified that appellant stated at this point that he also wanted to confess "to two more that he had done that night." The Riverside Village Apartments was the site of the five murders appellant had committed the previous October (including the one for which he was convicted in the instant case). Raulston testified that he was familiar with that incident, and knew then what appellant was talking about. Raulston testified that "as soon as he told us that he had wanted to confess to the Riverside Village plus two that occurred that night, I then read him the blue card and then's when we started talking about it."

Raulston gave appellant the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and also warned him of his right to terminate the interview at any time under Art. 38.22, V.A.C.C.P. In connection with this, Raulston was asked:

"Q. Okay. Let me ask you specifically if you informed the defendant of the charge that—that he might be facing in this case?

"A. He advised us that he was guilty of the murders that occurred."

Raulston testified that after reading the warnings to appellant, he asked him "if there was any questions or requests concerning the warning and he advised that he had no requests or questions about it; that he fully understood it."

Raulston was concerned that one or both of that night's victims might still be alive. Raulston asked if appellant would take the police back to the site of that night's murders, and appellant replied that he would. Two more officers and an assistant district attorney joined Raulston to help with the investigation. When appellant was introduced to the assistant district attorney, appellant said that he did not want any publicity. When the assistant district attorney told him that he could not make any promises, appellant turned to him and said, "well, I don't want you posing with me and saying that you solved this crime, because I came to you." Appellant, Raulston, and the other three then drove to the murder scene, leaving Rev. Spearman at the police station.

The assistant district attorney, Rufus Adcock, also testified at the *Jackson v. Denno* hearing. Adcock testified that when the group arrived at the apartment building to which appellant had directed them, he said to appellant, "Mr. Granviel, do you understand you have a Constitutional right to refuse us the right of entry into your home or search it for any reason whatsoever", and that appellant said yes. Adcock then asked if appellant waived the right. Adcock testified that appellant responded, "I came to you and I'm taking you to them."

Appellant gave the police a key. Raulston and Detective Hudson entered and found two dead women inside the apartment. The Crime Scene Search Unit and the Medical Examiner were summoned. After handing the investigation of the scene over to them, the officers took appellant back to the police station.

When the group returned to the police station, Detective Hudson again warned appellant of his rights, and asked appellant if he wanted to give a statement about the Riverside Village murders. Appellant replied that he did, and began at 1:09 a.m. to give a statement to Detective Hudson. The record reflects that Hudson took down the statement in longhand, and then gave his transcription to a typist to be typed.

At 2:40 a.m., appellant had finished his first statement, concerning the Riverside Village murders. As Raulston prepared to take down the second, concerning the murders appellant had committed that night, appellant told Raulston that "he had a legal question that he would like to ask." Raulston went to Adcock. Adcock came into the room and asked appellant if he could answer the question for him. Appellant replied no, he didn't think so. Adcock then motioned toward a telephone in the room and told appellant "to call whoever he liked". Appellant "then said something and looked at [Adcock]—pertaining to an automobile title and his car." Adcock further testified as follows:

"A. Because when he said that, I'm sure I looked at him like here we are right in the middle of this, or something. He just said it really doesn't matter and took his arm and moved the telephone and phone book back and said, I'll sign the statement.

"Q. What, if anything, did you do? Did you have any other conversation with him at that time?

"A. No. I went to Mr. Raulston and told him to warn him again of his Constitutional rights."

was. By this time Steven got loose, the gag was off his hands was loose. He was sitting there crying. I tied him back up and gagged him again, but I can't remember what I used. *I took Laura back in the back room. I raped her then we sit there and talked for about an hour.*" [The confession goes on to recount appellant's murder of Laura, Linda, Martha, Steven and Sabe McClendon.] [emphasis ours.]

Raulston then began taking appellant's statement concerning that night's murders. Appellant signed both statements in their typewritten form. Both were introduced at trial.

Appellant contends that his expression of the desire to ask a legal question constituted an invocation of the right to counsel. The Fifth Amendment right to counsel is a product of the *Miranda* decision:

"... the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.

"...

"Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during the interrogation under the system for protecting the privilege we delineate today."

Miranda applies, however, to statements stemming from custodial interrogation only:

"... briefly stated [our holding] is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

The Fifth Amendment right to counsel fashioned by *Miranda* was not triggered in the instant case. In express terms, *Miranda* excludes from its scope volunteered confessions such as appellant's:

"In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. *The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and of counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.*" [our emphasis.]

The *Miranda* opinion distinguishes clearly between "statements obtained through interrogation" and confessions. The record reflects that appellant volunteered his confession, and that the resulting statements were not obtained by interrogation. Appellant had no Fifth Amendment right to counsel while giving a voluntary confession that was not the product of custodial interrogation.

Moreover, appellant's Sixth Amendment right to counsel had not yet attached at the time he confessed. "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him —'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), quoting *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972).

[3] Assuming that a right to counsel was available to appellant the time he confessed, and assuming further that his statement that he would like to ask a legal question (from the context evidently about a car title) invoked his right to counsel, we find that appellant "initiated further communication, exchanges or conversations with the police" when he said "it really doesn't matter" and "took his arm and moved the telephone and phone book back and said, I'll sign the statement." See *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); see also *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). Furthermore, the record fails to reflect that appellant was interrogated after this supposed invocation of the right to counsel. The record reflects merely that appellant was again warned and thereupon began dictating a narrative account of that night's murders. Therefore, assuming invocation of the right to counsel, there was either a reinitiation or no further interrogation. In either event, there was no violation of *Miranda*, as *Edwards*, supra, makes clear:

"Had Edwards initiated the meeting [on the day following his invocation of the right to counsel], nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver."

Ground of error number five is overruled.

Appellant's seventh, eighth, ninth, tenth, and eleventh grounds of error concern the admissibility of a transcript of testimony from an earlier trial. An understanding of the issues surrounding the transcribed testimony requires a brief digression into the history of this case.

Appellant committed the offense in October, 1974, and was indicted in February, 1975. Two attorneys were appointed to represent him. Over defense objection, Dr. John Holbrook, a psychiatrist, testified at the guilt-innocence phase of the trial on the issue of appellant's sanity at the time of the offense. Appellant was found guilty and death was assessed as punishment. This court affirmed the conviction, *Granviel v. State*, 552 S.W.2d 107 (Tex.Cr.App. 1976), cert. denied 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977), and denied habeas corpus relief, *Ex parte Granviel*, 561 S.W.2d 503 (Tex.Cr.App.1978). On appeal from denial of writ of habeas corpus in federal district court, the Fifth Circuit granted habeas relief for *Witherspoon* error. *Granviel v. Estelle*, 655 F.2d 673 (1981).

Appellant was tried again in 1983. This appeal is from the conviction at that trial. Dr. Holbrook died before the second trial was held. During the guilt-innocence phase at the second trial, the State offered a transcript of Dr. Holbrook's testimony to rebut defense evidence of appellant's insanity at the time of the offense. The trial court admitted the transcript over appellant's objections.

[4, 5] Appellant contends that the court erred in admitting Dr. Holbrook's testimony because it was protected by the attorney-client privilege. Appellant raised the same issue on appeal from the first trial, and this Court rejected his contention. See *Granviel v. State*, supra. Under the doctrine of "the law of the case", where determinations as to questions of law have already been made on a prior appeal to a court of last resort, those determinations will be held to govern the case throughout all of its subsequent stages, including a retrial and a subsequent appeal. *Ex parte Calvin*, 689 S.W.2d 460 (Tex.Cr.App.1985); *cf. Willis v. State*, 479 S.W.2d 303 (Tex.Cr.App.1972). Ground of error number nine is overruled.

[6] Appellant contends that the court erred in admitting the testimony because—according to appellant—Dr. Holbrook based his opinion, in part, on the results of tests conducted by Dr. Jerold May. Dr. May's tests were not shown to have been conducted under Dr. Holbrook's supervision or control. Relying on *Lopez v. State*, 628 S.W.2d 77 (Tex.Cr.App.1982), appellant argues that Dr. Holbrook's testimony should have been excluded.

Dr. Holbrook testified that he examined appellant on two occasions. Defense counsel then questioned Dr. Holbrook as follows:

"Q. The conclusions you reached and your opinion of Kenneth Granviel *was based upon information that you received from him while talking to him on those two occasions, was it not?*

"A. *That's correct.*" [emphasis ours.]

Dr. Holbrook's only testimony about Dr. May's testing of appellant was as follows:

"Q. [Prosecutor] At that time, Dr. Holbrook, had you requested that any psychologists make any tests on Granviel?

"A. Yes. At the conclusion of examination I asked Mr. Dickens [Defense counsel] if he could have some psychological testing done and recommended Howard Patterson over here. I think he decided he couldn't do it and somebody else did it, so I don't know who the tester is here.

"Q. Were you at any time furnished with the results of any psychological testing that were done on Kenneth Granviel?

"A. Yes, I was.

"Q. And whose report was furnished to you?

"A. You mean the name of the psychologist?

"Q. Yes.

"A. I think he signed it. Jerold May, PhD."

...

"Q. In that respect [whether an antisocial personality is a psychosis or major mental disorder], do you disagree with the conclusions reached by Dr. Jerold May in his report to you, sir?

"A. Well, I think the conclusions in this report vary. If we are talking about his final conclusions, I think I would disagree with the diagnosis, yes."

At no point does Dr. Holbrook's testimony reflect that he based his opinion in part on the results of Dr. May's tests, as alleged by appellant. Ground of error number seven is overruled.

[7] Appellant next contends that, because Dr. Holbrook did not give him the *Miranda* warning before the two examinations, Dr. Holbrook's conclusions based on those examinations are inadmissible under *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) and *Ex parte Demouchette*, 633 S.W.2d 879 (Tex.Cr.App. 1982). Appellant's Fifth Amendment privilege not to be compelled to be a witness against himself was not violated by the absence of *Miranda* warnings before appellant's two interviews with Dr. Holbrook because appellant's responses during those interviews were not compelled. The record reflects that defense counsel sought out Dr. Holbrook and requested that he examine appellant for competency to stand trial and sanity at the time of the offense. Moreover, Dr. Holbrook testified that both defense counsel were present during his first interview with appellant, one defense counsel was present during the second, and that no one else was present during either. On these facts, we find that *Miranda* warnings were not required because Dr. Holbrook's interviews with appellant were not instances of "in-custody interrogation ... contain[ing] inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, supra; see also *Estelle v. Smith*, supra, 451 U.S. at 466–470, 101 S.Ct. at 1874–1876.

The eighth ground of error is overruled.

In a related ground of error, appellant contends that the trial court erred in refusing to instruct the jury at the punishment phase that it could not use the testimony of Dr. Holbrook for any purpose. Appellant argues, again, that because his statements to Dr. Holbrook were unwarned, Dr. Holbrook's conclusions based on those statements were inadmissible for all purposes. Appellant concludes that it was error for the trial court not to instruct the jury to ignore Dr. Holbrook's testimony. Because of our disposition of the previous ground of error, we find no merit in

appellant's argument. The tenth ground of error is overruled.

[8] Because Dr. Holbrook was not available as a witness at the second trial, appellant contends that the trial court's admission of the transcribed testimony denied him his constitutional right to confront and cross-examine the witnesses against him. The record reflects that appellant was represented by counsel at the first trial, and that counsel cross-examined Dr. Holbrook. The transcript of testimony admitted at the second trial included the cross-examination. Appellant's constitutional right of confrontation and cross-examination was not violated by admission of the transcribed testimony at the second trial: "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); see also *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), and *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

Appellant's twelfth ground of error alleges that the trial court erred in admitting the testimony of Dr. Vernon Groves because the warnings required by *Estelle v. Smith*, supra, were not given. Appellant's argument of this ground of error consists of the following:

> "Dr. Groves examined appellant when he was released from Gatesville. He also did not warn Appellant of his right to remain silent. ... Appellant's requested limiting instruction to exclude consideration of Holbrook's and of Grove's [sic] testimony was denied."

Appellant has not cited any place in the record where may be found an objection to Dr. Groves's testimony on the ground he now complains of. We have examined the record of Dr. Groves's testimony. The record fails to reflect any objection to its admissibility on the ground appellant adduces on appeal. (Appellant's second trial was held after the decision in *Estelle v. Smith*, supra, had been rendered.) Appellant's twelfth ground of error is overruled.

[9] In his sixth ground of error, appellant contends that "the court erred in denying appellant's motion to dismiss [the instant indictment] because the court was obliged to find the State not ready on the other indictments arising out of that single transaction." The record reflects that, before trial, appellant filed a motion to set aside and dismiss the indictment, envoking Art. 32A.02, V.A.C.C.P. and the Sixth and Fourteenth Amendments. The trial court held a hearing and denied the motion.

As pointed out above, the Fifth Circuit granted appellant habeas corpus relief from his original conviction. The record reflects that the State then petitioned for writ of certiorari in the Supreme Court. The Court denied the petition. The record contains the subsequent order of the Federal District Court conditionally granting the writ of habeas corpus. The order is dated June 26, 1982.

The record reflects that appellant's motion to dismiss was filed July 8, 1982. The trial court heard and denied the motion on August 10, 1982.

Article 32A.02, supra, provides in pertinent part:

"Sec. 1. A court shall grant a motion to set aside an indictment, information, or complaint if the state is not ready for trial within:

"(1) 120 days of the commencement of a criminal action if the defendant is accused of a felony;

"Sec. 2. ...

"(b) If a defendant is to be retried following a mistrial, an order granting a new trial, or an appeal or collateral attack, a criminal action commences for purposes of this article on the date of the mistrial, the order granting a new trial, or the remand."

[10] We find that the instant action commenced for purposes of the Speedy Trial Act on June 26, 1982, the date the Federal court granted the writ and put the State to the choice of releasing appellant or re-

trying him. Appellant filed his motion to dismiss on July 8, 1982, well within the 120 day time period. When an accused files a motion to dismiss under the Speedy Trial Act, *before* the applicable time period has expired, based on the State's failure to announce ready for trial *within* the applicable time period, the motion is premature and should be denied. See *Johnson v. State*, 649 S.W.2d 111 (Tex.App.—San Antonio [4th dist.] 1983), aff'd 662 S.W.2d 368 (Tex.Cr.App.1984); see also *McGee v. State*, 629 S.W.2d 182 (Tex.App.—Waco [10th dist.] 1982).

[11] Appellant also claims that his constitutional right to a speedy trial has been violated. Issues arising under our Speedy Trial Act are distinct from issues arising under the constitutional guarantee of a speedy trial. Yoking such distinct claims in one ground of error renders the ground of error multifarious. Nevertheless, we have reviewed appellant's claim under the Sixth and Fourteenth Amendments and find it to be without merit. Appellant argues that, because the State has not tried him or announced ready for trial on any of the other indictments arising out of the same transaction as the instant cause, the other indictments should have been dismissed and prosecution under them barred. Therefore, appellant concludes, prosecution of the instant case should also be barred. There is no rule of "transactional bar" in the constitutional speedy trial guarantee. The sixth ground of err · is overruled.

[12] In his first, second, and third grounds of error appellant contends that the trial court erred in sustaining the State's challenge for cause against three veniremen, in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Appellant argues that "unless a venireman states *UNAMBIGUOUSLY* that he or she would automatically vote against the imposition of capital punishment NO MATTER WHAT THE TRIAL MIGHT REVEAL, it simply cannot be assumed that that is the juror's position. [citing Witherspoon, supra.]" [appellant's emphasis].

In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Court wrote:

> "The standard [for constitutionally permissible exclusion for cause] is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' [quoting *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)]. We note that in addition to dispensing with Witherspoon's reference to 'automatic' decision-making, this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror."

See also, *Lockhart v. McCree*, — U.S. —, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) ("It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases *so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.*" [our emphasis].)

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The pertinent portions of each venireman's testimony are set out in the footnote.[2] We find that in each instance the venireman's testimony reflects an adequate

2.

[Mrs. Copeland]
"Q. Okay. I suppose that would be a pretty traumatic experience in your life and would get you to soul-searching—
"A. Yes.
"Q. —pretty thoroughly.
"Is—am I to understand you, then, that—that no matter what the facts were, might be presented to you as a juror, that because of your feelings against the death penalty you would automatically vote against that death penalty in any case 'cause you just personally couldn't do it? Couldn't vote to assess the death penalty?
"A. I don't believe I could.
"
"Q. [Prosecutor] I would like to ask you now: Do you have any conscientious, religious or moral objections to the infliction of the death penalty as a punishment for crime in a proper case, and by proper case I mean one where the law provides for it and the facts justify it?
"A. Yes, I do. I believe it's wrong.
"Q. Is that an opinion, Mrs. Copeland, that you have had for some time?
"A. No, I have just recently came to this decision after my brother's death.
"Q. As the judge stated to you yesterday, you're perfectly entitled to your opinion that—as to any law that you might be called upon to follow in any case and if your objections are such that you just could not do it and you—you would be placed in a horrible position of taking an oath to do something that your conscience wouldn't let you do, well, then, now, I think, is the time to tell us.
"A. I could never say that the man should be killed.
"Q. Okay, and of course, I'm not asking you about this case only, but cases in general, and am I to understand you, then, that—that you could not vote so that the death penalty would be involved, no matter what facts might be presented to you?
"A. I couldn't.
"Q. Okay. Is that a very firm opinion that you have, Mrs. Copeland?
"A. Unless something happens to change my mind, yes.
"Q. Okay. Right now can you think of anything that would change your mind?
"A. I don't—no, I can't.
"
[By the Court:]
"Q. Mrs. Copeland, there's a matter that we need to clear up at this point.
"You have told Mr. Wilson in response to his questions by the State in essence that your feeling about the death penalty is such that you could never serve on a jury in which you could vote for the imposition of the death penalty in any case, regardless of what the facts are; right?
"A. I'm sorry. I'm getting confused now.
"Q. Okay. I'm trying to unconfuse you.
"You have told Mr. Wilson that you have a very strong feeling in opposition to the death penalty in any criminal case?
"A. Yes.
"Q. That your feeling is so strong in that regard that you could not serve on a jury and vote in such a manner that the death penalty would be imposed as a juror, regardless of what the facts are; right?
"A. Right.
"Q. Okay. You have now told Mr. Beatty that you could answer those two or three questions in the penalty phase of a capital murder case yes if the evidence said that you should answer them yes?
"A. This was if I was on the jury.
"Q. Okay.
"A. I—
"Q. Uh-huh. All right. Go ahead.
"A. Did I just cross my answers?
"Q. You sure did.
"We need—you have told the State you cannot and told the defense you can, and all we need to know is which way it is?
"A. Okay. If I was on, which I know—I could never say that he should die, whoever, but I could listen—this is where I thought the questions were coming from. I thought I could listen to the evidence and answer these questions yes, but when it came to the point of saying I thought he should die, I can't.
"Q. Okay. Then what in essence you're telling us is maybe that you could serve on a jury and if the evidence showed those answers should be yes, you could vote yes knowing that I would be the person that said he would die; is that how it goes?
"A. Yes.
"Q. That's the way it works. The judge assesses the death penalty.
"A. Yes.
"Q. But the jury tells him to assess the death penalty, so all we need to know is—is how you feel?
"A. No.
"Q. No what?
"A. Because then I would still be saying that he should die.
"Q. Yes. You and 11 others would if that were the situation, uh-huh. If the answers are yes, if all the answers are yes, then the judge is going to impose the death penalty; if any one of them is no, then the judge is going to impose the life sentence. See?
"A. Right.
"Q. Okay. Now, I think we're finally getting down to this point and it's a point of procedure of how it's gone about.
"All right?
"A. Uh-huh.
"Q. Does it make a great deal of difference to you in your feeling about the imposition of

Note 2—Continued

a death penalty in a criminal case whether the foreman of the jury writes out life or death or whether the foreman of the jury writes down yes three times .... Has the same effect, doesn't it?

"A. (nods).

"I can't do it.

"Q. Under any circumstances?

"A. No sir.

"Q. All right.

"That's fine, Mrs. Copeland. That's all we need to know, you know, is how you feel about it and—and that is entirely your business, but we sure do need to know it.

"Now, are you firm in that conviction?

"A. Yes.

"Q. Would it be a fair statement to say that you are so unalterably opposed to the imposition of a death sentence that you would never vote for it, regardless of what the facts showed?

"A. Well, as I told Mr. Wilson, unless something happened to change my mind.

"Q. Okay.

"A. I have no idea what could change my mind, but—

"Q. Well, of course, we can't go into that and—and actually the law requires the inquiry to be made as of right now, so I take it your answer is as of right now?

"A. Is no.

"Q. Okay. All right.

"Okay. That's what we needed to know. Thank you, Mrs. Copeland.

"THE COURT: State's challenge is sustained."

* * * * * *

[Mr. King]

"Q. [Prosecutor Bays] In a p ..per case, do you have any religious, conscientious or moral objection against death as a punishment for crime?

"A. I do.

"Q. Could you tell us how you formed this opinion, sir?

"A. I think it would just be devastating to my conscience. I guess I'm going through a spiritual organization or reorganization and I just don't think I could do it.

"Q. Well, are you saying you wouldn't want to do it or you couldn't do it?

"A. I couldn't do it.

"Q. You couldn't do it?

"Is this opinion you have—I take it's not something you have held—a view you have held for a number of years?

"A. I have—probably hasn't faced me like this before, but I would, generally would agree with your assumption.

"Q. Well, of course it's—it's one thing to—to be down at your club or on the golf course talking about the death penalty in the abstract and it's quite another thing to be seated up here knowing that you may find yourself with that kind of responsibility.

"A. Yes.

"Q. It—it—it's no longer an abstract concept; it's a very real situation—

"A. Yes.

"Q. —that confronts you.

Is this—am I to understand that your feelings are the result of your religious experience that you may have had recently?

"A. Yes.

"Q. I see.

"Well, Mr. King, let me ask you this. Is this feeling on your part so firm that—that you would automatically vote against the death penalty regardless of what the facts in the case might show?

"A. Yes.

"Q. Yes?

"A. Yes.

"Q. And I take it that the feeling that you have expressed here is so deep-rooted that—that you couldn't imagine any set of circumstances whatever that would cause you to abandon this feeling you have?

"A. No.

"Q. —and what we are seeking here is—and I want to tell you I appreciate your candor on this subject—but we are seeking here a group of people, 12 people who can fairly and impartially listen to all the evidence and fairly consider all of the possible variations of outcomes that may be here, and you're telling this judge, I take it, that you couldn't be a part of the infliction of the death penalty?

"A. Yes.

"Q. You just—you wouldn't want it on your conscience?

"A. That's right.

"Q. All right.

"Now, I'm saying these things for you.

"Could you tell us now, now that you have had a chance to sort through your thoughts, just tell us, if you will, how you feel about the death penalty and why you feel this way?

"A. It's the feeling—it's just my conscience. I think if I had to make that decision I would feel like that I was the one that did it, because it would be left up to me. If all the rest agreed, then I just couldn't have that on my conscience.

"A. Well, that's the way I feel, if it meant that I would vote for the death penalty, I wouldn't take the oath.

"Q. All right.

"Let me—let me ask you about—suppose you found yourself on the jury, suppose we go over the oath question for a minute and you actually do find yourself on the jury and as distinguished a gentlemen as you are, I'm sure you would be a good candidate for foreman of the jury.

"Could you sign a verdict—knowing it to be a true verdict, could you sign the verdict form as the foreman knowing once again that your signature on that document and the doc-

Note 2—Continued

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[Reverend Curry
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Note 2—Continued

uments returned to the judge would necessarily cause the death penalty to be imposed?

"A. No, I couldn't.

* * * * * *

[Reverend Curry]

"Q. [Prosecutor Bays] Let ask if you have any religious, conscientious or moral objections to the imposition of the death penalty as a punishment for crime?

"A. I do.

"Q. All right.

"Have you held this view for some time, sir?

"A. Yes. Prior to even going into the ministry I did.

"

"A. I don't believe that any man has the right to sit in righteous judgment on another.

"Q. Righteous judgment? Being—

"A. Determining whether he should live or die.

"Q. That is—is there difference, then, between judgment and righteous judgment?

"A. Yes.

"

"Q. Okay. Now, Reverend Curry, is this feeling you have, you have had it now for four—four years, I suppose. Is this feeling on your part so firm that you would automatically vote against the death penalty, regardless of what the facts might show in the case?

"A. Irregardless.

"Q. ...

"Now, earlier you said that your opinions about the death penalty were so firm that you would automatically vote against the death penalty regardless of the facts of the case?

"A. Irregardless.

"Q. All right.

"Now, is what you're telling the judge, then, that even if you were convinced beyond a reasonable doubt, for example, that the defendant acted deliberately and there was a reasonable expectation that his actions would result in the death of another, that you might answer no to that question when in fact in your heart you knew the answer was yes?

"A. Oh, no, I wouldn't do that. I wouldn't lie about it.

"Q. All right.

"Well, this is—you would answer the question truthfully?

"A. Truthfully, that's right.

"Q. All right.

"Now, the second question is—we're talking about whether there's a probability he would commit criminal acts of violence?

"A. Uh-huh.

"Q. All right.

"Let's assume the situation where you had been convinced beyond a reasonable doubt, whatever evidence is required to show you that proposition is true, and you know, there are some people in our society that continue to commit crimes day after day after day.

"If you were convinced of that beyond a reasonable doubt, could you answer yes to that knowing that you have already answered yes to the first question and knowing that the two yes answers just—

"A. Two yes answers would give him—

"Q. —give him the death penalty?

"A. —death penalty.

"Q. Could you do that?

"A. I would answer it truthfully if I was on the jury, yes.

"Q. You could do that?

"A. Yes.

"Q. All right.

"Now, here is the—the oath that you'll have to take as a juror. You see it over here? It's closer to me. It's on the larger card?

"A. Uh-huh.

"Q. And what that oath says is that you will a true verdict render according to the law and the evidence, so help you God?

"A. That's right.

"Q. Okay, so if you take that oath, then you're telling—I guess that you are telling us now is that even though you're—you're adamant in your opposition of the death penalty, if you take an oath to render a true verdict, then you will render a true verdict and it won't matter to you whether death results or not?

"A. Oh, it matters. That's why I don't want to be a part of it, to be placed in that position.

"Q. Well, Reverend Curry, you can see why this process takes a while, but we just, you know, this is the one and only opportunity we're ever going to have to talk to you, okay?

"A. Okay.

"Q. If I understand what you are saying, then, is you just don't want to be a part of this because of the feelings you have about the death penalty?

"A. That's right. I'm liable to be put in the position by telling the truth of what I have heard and what I understand that would transpire as a juror would place me in this position that I couldn't—I would have to go against what I believe, staunchly believe in, and that I would demand then that he be given capital punishment and whatever you said it was, an injection or something, lethal injection, and I don't want to be placed in that position.

"Q. Well—

"A. Because I will not lie about it.

"Q. All right.

Well, now, you know, no one can—can force you to take an oath as a juror?

"A. I know.

"Q. Are you telling the Court, then, that you would not take the oath as a juror?

"A. Oh, no. I can take—as long as it's before a magistrate I can take an oath.

"Q. All right, but once—

"A. I have already taken two.

"Q. But once—but we're talking about the oath that says you'll give a true verdict in a death penalty case?

basis upon which to conclude that the prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The first, second, and third grounds of error are overruled.

[13] In his fourth ground of error, appellant contends that "the trial court erred in administering the oath required under article [sic] 12.31(b) of the Texas Penal Code as such oath prevented the jurors from exercising their discretion and considering all the mitigating evidence in considering whether to assess the death penalty." Section 12.31(b) provides as follows:

"Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

Appellant argues as follows:

"Although the State has stopped questioning jurors about the oath required under 12.31(b) and therefore no one is excused for failure to take the oath (because they are not told they can avoid taking the oath), the harm attendant to administering the oath is still present. It does not make much sense to prevent some one from being excused for failure to take the oath because to do so would deprive the accused of a fair and impartial jury but then to allow the trial court to require the jury swear an oath not to let the imposition of the death penalty affect their deliberations. The oath not only violates the spirit of *Adams v. Tex-*

Note 2—Continued

"A. That's right. If I took that oath that's what I would do.

"Q. All right.

"Would you take the oath becomes the question?

"A. No, because it's going to place me in an uncompromising position.

"MR. HILL: Your Honor, we'll raise the same objection we raised earlier regarding the Motion in Limine Three.

"THE COURT: Overruled.

"BY MR. BAYS:

"Q. You would refuse to take the oath?

"A. If it's going to place me in a position that I can't get out of—that would make me go against my own conscience.

"Q. Now, at that time what I'm asking is: knowing the State of Texas and knowing what can happen and knowing your own feelings about the death penalty, will you or will you not take the oath?

"A. Not if it's going to put me in that position.

"MR. HILL: We're going to object to the—on the same grounds we have before. Mr. Bays by that question is attempting to expand the requirements or the qualifications of the juror and we object.

"THE COURT: Overruled.

"BY MR. BAYS:

"Q. And your answer is not if it will place you in a position—

"A. That it's going to make me have to make a decision whether the man lives or dies.

"Q. And based upon that question you're taking the position that rather than you be placed in the position of having to either set aside your personal conviction or not, you would choose not to take that oath?

"A. That's right, because I don't want to be put in that position, 'cause I'm not going to set them aside irregardless.

[THE COURT]

"Now, had you been selected to serve as a juror in the trial of a capital murder case, in the event you had been selected to serve in that capacity, you have told us that you have a very strong and very severe feeling of principle against the infliction of the death penalty under any circumstances, regardless of what they might be?

"A. That's right.

"Q. All right.

"The question, then, becomes if you were serving on a jury which were to determine those questions and that matter—

"A. Uh-huh.

"Q. —all I need to know at this point is how strong is that feeling, Reverend? Would you always vote against death or are there circumstances under which you could vote for it if the evidence shows you you should?

"A. Irregardless I will not change my position, that I will not want to be in a position to have to decide whether a man would live or die.

"Q. All right.

"A. And I would vote that he live irregardless to whether the evidence was presented.

"Q. Every time?

"A. Every time.

"Q. Okay."

as, supra, but also violates the tenets of *Edmund [sic] v. Florida*, supra, [458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140] in that it forces the jury to swear not to consider [sc. allow?] their feelings about the death penalty to affect their deliberations nor does the oath allow the jurors to consider mitigating evidence in determining whether to answer the questions yes or no. By giving the oath, the trial court has forced the jury to consider only the evidence which goes directly to the answering of the questions and to ignore the juror's feelings and arguments against the death penalty."

In *Adams v. Texas*, supra, the Supreme Court held that exclusion of members of the venire from jury service because they are unable to take the oath of Sec. 12.31(b), supra, violates the Sixth and Fourteenth Amendments as construed and applied in *Witherspoon v. Illinois*, supra. Appellant does not claim that members of the venire were excluded from jury service because they were unable to take the oath of Sec. 12.31(b).

Appellant does not claim nor does the record reflect that any juror balked at or expressed reservations about taking the oath. Appellant does not claim nor does the record reflect that any prospective juror was told that he would not be allowed to serve if he did not take the oath. Appellant did not ask the trial court to inform the prospective jurors that they could not be excluded from service for their inability or unwillingness to take the oath. The record reflects that after the jury was chosen from the venire, but before the members were sworn, appellant objected outside the jury's presence to the administration of the oath on the ground that administration of the oath violates *Adams* and *Witherspoon*.

That the State may not exclude from service persons who cannot or will not take the oath does not imply that persons who can and do take the oath may not serve on a capital jury, or that a jury composed solely of persons who have taken the oath is constitutionally impermissible. *Adams* does not require that a capital jury be composed of persons whose deliberations on issues of fact *will* be affected by the mandatory penalties; rather the case holds that such persons may not, without more, be excluded from service on the jury. Cf. *Lockhart v. McCree*, supra. Because the prospective jurors in the instant case were not required to take the oath as a condition of service on the jury, the operation of the statute and administration of the oath in this case did not violate the holdings of *Adams* and *Witherspoon*. See also *Milton v. Procunier*, 744 F.2d 1091 (5th Cir.1984); *Brooks v. Estelle*, 697 F.2d 586 (5th Cir. 1982).

[14] If we understand him correctly, appellant claims further that the oath unconstitutionally denies jurors the freedom to deliberate and decide issues of fact in a capital case in light of their feelings toward the death penalty as a general issue, and arguments against the death penalty on policy grounds. In other words, appellant claims that jurors must be allowed to find the facts as a means toward accomplishing the result the juror thinks just; that is, according to the juror's belief whether this or any defendant should suffer penalty of death.

Perhaps jurors sometimes do subordinate the facts to the result they wish to reach. That is not the issue, however. Appellant claims that the Constitution *prohibits any* restraint on a juror's power to deliberate and find the facts according to his feelings about the death penalty. That contention runs contrary to the predicate of *Witherspoon v. Illinois*, supra, and *Wainwright v. Witt*, supra. What are those cases about, if not the extent of the State's power to remove prospective jurors who will not "temporarily set aside their own beliefs in deference to the rule of law" (*Lockhart v. McCree*, supra)?

Moreover, the oath does not prohibit jurors from considering all mitigating factors in arriving at answers to the special issues at the punishment phase. Appellant mistakes considerations of the justice or wisdom of the death penalty for mitigating factors. The catalog of possible mitigating circumstances found in such cases as *Jurek v. State*, 522 S.W.2d 934 (Tex.Cr.App.1975),

aff'd 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) does not support appellant's view of "the juror's feelings and arguments against the death penalty" as mitigating factors.

The fourth ground of error is overruled.

[15] In his eighteenth ground of error, appellant claims the trial court erred in denying his offer of certain testimony at the punishment phase. The record reflects that appellant offered testimony to show the death penalty's lack of deterrent effect. The State "moved to quash" the testimony and the court granted the motion. Appellant reoffered the testimony for "the jury's consideration in mitigation of punishment." The court denied the offer. Article 37.071(a), V.A.C.C.P. provides, in part, that at the punishment phase, "evidence may be presented as to any matter that the court deems relevant to sentence." We will not repeat our discussion of the previous ground of error. It must suffice here to say that evidence about the effectiveness of the death penalty as an instrument of social policy is simply not relevant to the special issues of a capital punishment proceeding.[9] There was no abuse of discretion in denying the offer of evidence.

Appellant claims in his brief that he called the witness "to rebut the State's contention that the death penalty acts as a deterrent to others who would commit capital murder." Assuming, arguendo, that the evidence would be admissible in rebuttal of such a claim, appellant does not point out where the State made this contention to the jury. Moreover, appellant offered the testimony in mitigation, and not in rebuttal of some contention by the State.

Appellant relies also on *Powell v. State*, 631 S.W.2d 169 (Tex.Cr.App.1982) and *Campbell v. State*, 685 S.W.2d 23 (Tex.Cr.App.1985). In those two cases the convictions were reversed for the trial court's refusal to allow defense counsel to question the venire on rationales of punishment. Appellant concludes that "the purpose of punishment is a legitimate consideration of the jury." *Powell* and *Campbell* are inapposite here. Neither was a capital case. The role of a capital jury at the punishment phase is much more narrowly circumscribed than that of ordinary felony juries. The jury in a capital case sits solely for the purpose of answering the special issues. The legislature has determined what punishment must be assessed, according to the answers given. A capital jury does not have the authority to arrive at or alter its answers to the special issues on the ground that it believes that the "purpose of punishment" will not be served by imposition of the death penalty on the defendant. The eighteenth ground of error is overruled.

[16] In three grounds of error appellant complains of the testimony of two court bailiffs. The record reflects that both bailiffs testified at the punishment phase of the trial. One bailiff testified that he saw appellant, while in private conference with his attorney in a holdover cell, slap the attorney. The other bailiff testified that he saw appellant, while in private conference with his attorney, grab the attorney by the coat or tie. Appellant claims that these acts were communications protected by the attorney-client privilege, and that permitting the bailiffs to testify to these matters deprived him of the effective assistance of counsel. We find that, on the facts of this case, appellant's acts of slapping and grabbing his attorney do not constitute communications protected by the attorney-client privilege. Grounds of error sixteen and seventeen are overruled.

Appellant argues that the bailiffs were not competent to testify, as follows:

"It has been held that the Court's bailiffs becomes [sic] an extension of the court when that bailiff attends the jury. As such, he is cloaked with the credibility of the Court and is not, therefore, a competent witness. This is true in part because he has had the opportunity to gain the confidence of the jurors by his constant association with them."

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9. In approving the death penalty scheme of our statute the Supreme Court stated in *Jurek* that "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the *individual offense* and the *individual offender* before it can impose a sentence of death." [our emphasis.]

ever evidence is required to show you that proposition is true [the probability of appellant's committing criminal acts of violence in the future], and, you know, there are some people in our society that continue to commit crimes day after day after day.

If you were convinced of that beyond a reasonable doubt, could you answer yes to that knowing that you have already answered yes to the first question and knowing that the two yes answers just—

A. Two yes answers would give him—

Q. —give him the death penalty?

A. —death penalty.

Q. Could you do that?

A. I would answer it truthfully if I was on the jury, yes.

Q. You could do that?

A. Yes.

The prospective juror continued to insist on his opposition to the death penalty in general, yet also continued to insist that he would truthfully answer the special issues based on the law and the evidence. He was clearly the type of juror who could not be excluded for cause, one who has scruples against the death penalty and yet will follow the law. *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). It was only when the prosecutor suggested that the venireman could escape the troublesome duty of serving on the jury in this capital case by refusing to take the oath required of jurors, Art. 35.22, V.A.C.C.P., that Curry stated he would not take the oath. Appellant specifically objected to the State's making this suggestion. The objection was overruled.

I dissent to this method of excluding a perfectly qualified juror, for the reasons elaborated in my dissenting opinion in *Ellis v. State*, 726 S.W.2d 39 (Tex.Cr.App., this day decided).

I also write to point out that there is no ambiguity to be resolved in Curry's responses. He was not an equivocating juror. Every time he was asked the relevant questions regarding his ability to serve as a juror he responded that he would answer the special issues based on the law and the evidence. It was only when the trial court in the final round of questioning again reverted to the "vote against" questions that appellant stated he would not follow the evidence:

Q. —all I need to know at this point is how strong is that feeling, Reverend? Would you always vote against death or are there circumstances under which you could vote for it if the evidence shows you should?

A. Irregardless I will not change my position, that I will not want to be in a position to have to decide whether a man would live or die.

Q. All right.

A. And I would vote that he live irregardless to whether the evidence was presented.

Q. Every time?

A. Every time.

This was not equivocation. Every time he was asked in the abstract whether he would "vote against death" the venireman responded that he would. Nevertheless, every time he was asked whether he could answer the special issues in the affirmative if the evidence proved that they should be so answered, he responded that he would. It is true that he did not want to be placed in the position of performing this duty and so seised upon the escape offered by the State by saying he would not take the oath. But before he was given that option he stated that he could take an oath to render a true verdict based on the evidence, and would follow it. He was a classic example of the type of juror who, under *Adams*, *supra*, could set aside his personal feelings and vote based on the law and the evidence in spite of his expressed objection to the death penalty in general. He was thus qualified to serve.

I respectfully dissent.

TEAGUE, J., joins.

ONION, P.J., not participating.

COUR

Title *

Sanchez,
Ex parte

Davis,
Ex parte

Joe,
Ex parte

Massey,
Ex parte

Gray,
Ex parte

* The title of each c
723 S.W.2d—5

GRANVIEL v. STATE Tex. 157

Cite as 723 S.W.2d 141 (Tex.Cr.App. 1986)

[17] Appellant cites no authority for the proposition he advances. Nevertheless, assuming it was error to admit the testimony of the two bailiffs, we find the error was harmless. The jury had heard evidence that in October 1974 appellant had raped a woman, and then killed her, together with two other women and two children, by stabbing them. The jury heard evidence that in February 1975, appellant killed a fourth woman by stabbing her, then raped a fifth woman and killed her by stabbing her and striking her in the head with a hammer. The same night as the latter two murders, appellant raped another woman twice and threatened yet another woman and her two young children with a handgun. In light of the foregoing evidence, we find the admission of the bailiffs' testimony that appellant slapped and grabbed his lawyers to be harmless error beyond a reasonable doubt. Ground of error fifteen is overruled.

[18] In his fourteenth ground of error appellant contends that the trial court erred in not applying the law to the facts of the aggravating offense of aggravated rape. Appellant timely objected to the charge on this ground. The record reflects that the court instructed in the abstract on the elements of the offense of aggravated rape. The paragraph applying the law to the facts reads as follows:

"Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt that on or about the 7th day of October, 1974, in the County of Tarrant and State of Texas, as alleged in Count One of the indictment, the defendant, Kenneth Granviel, did then and there intentionally cause the death of an individual, Natasha McClendon, by cutting her with a knife, while in the course of committing or attempting to commit aggravated rape (as hereinabove defined) of Laura McClendon, you will find the defendant guilty of the offense of capital murder and so say by your verdict; but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of capital murder...."

We have stated that the elements of the aggravating offense need not be set out in that portion of the charge applying the law to the facts of the case. *Garrett v. State*, 682 S.W.2d 301 (Tex.Cr.App.1984). We find no error in the charge in the instant case. The fourteenth ground of error is overruled.

The judgment of the trial court is affirmed.

ONION, P.J., not participating.

CLINTON, Judge, dissenting.

The majority performs a disservice to all concerned in its entirely summary treatment of appellant's grounds of error one, two, and three. To simply quote at length the Supreme Court of the United States, then to drop a great mass of raw transcript into the margin and perform absolutely no analysis is to refuse to perform the appellate function of this Court. Such conclusory treatment is especially inappropriate in a case in which the death penalty has been assessed.

Specifically, I dissent to the majority's disposition of ground of error three, regarding the exclusion for cause of venireman Edgar Lincoln Curry. Reverend Curry, an ordained minister, admittedly voiced strong religious and moral objections to the death penalty. When asked by the prosecutor if these objections were so strong that he "would automatically vote against the death penalty, regardless of what the facts might show in the case?" Curry responded, "Irregardless."

This question and answer, however, are not dispositive. In Texas jurors do not "vote for" or "vote against" imposition of the death penalty. The question is not how the venireman might vote in a popular referendum concerning capital punishment, but whether he can set aside his personal feelings and truthfully answer the special issues of Art. 37.071, V.A.C.C.P., based on the law and the evidence of the particular case. Rev. Curry stated that he could do so:

Q. [by the prosecutor] Let's assume the situation where you had been convinced beyond a reasonable doubt, what-

Appendix B

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP 19 1988
NANCY DOHERTY, CLERK
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH GRANVIEL

v. CIVIL ACTION NO. CA-4-87-862-E

JAMES A. LYNAUGH, Director
Texas Department of Corrections

JUDGMENT

This death penalty habeas action came on for consideration before the court, Honorable Eldon B. Mahon, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered as set forth in the Memorandum Opinion and Order entered this date.

IT IS ORDERED and ADJUDGED that his petition for writ of habeas corpus be DENIED for the reasons set forth in the said memorandum opinion and the findings, conclusions and recommendation of the magistrate adopted as the findings and conclusions of the court as set forth in said memorandum opinion.

IT IS FURTHER ORDERED that the Clerk of the Court shall transmit a true copy of this Judgment, the Memorandum Opinion and Order, and the Order Lifting Stay of Execution to:

1. Petitioner - Kenneth Granviel
   T.D.C. No. 0005333
   Ellis Unit
   Texas Department of Corrections
   Huntsville, Texas 77340

2. his attorneys -

   Danny D. Burns
   Attorney at Law
   First Floor, 111 North Houston Street
   Fort Worth, Texas 76102-2007
   817/654-2916
   State Bar No. 03443800

Lee Ann Dauphinot
Attorney at Law
Suite B, 511 East Bluff Street
Fort Worth, Texas 76102
817/335-7222
State Bar No. 05409450

3. Respondent - James a Lynaugh
Director
Texas Department of Corrections
P.O. Box 99
Huntsville, Texas 77340

4. his attorney - Jim Mattox
Attorney General of Texas, and
William C. Zapalac
Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711
512/463-2080

and information copies to:

1. William Clements
Governor
State of Texas
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Attn: General Counsel

2. George S. Kredell
Judge, 213th District Court of Tarrant County
300 West Belknap Street
Fort Worth, Texas 76196
817/334-1529

3. Jerry Peterson
Warden
Ellis Unit I
Texas Department of Corrections
Huntsville, Texas 77340

4. Tom E. Hill and
John C. Beatty
Attorneys at Law
201 Main Street
Fort Worth, Texas 76102
817/336-3600

SIGNED this 19th day of September, 1988.

Eldon B. Mahon
UNITED STATES DISTRICT JUDGE

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP 19 1988
NANCY DOHERTY, CLERK
By Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH GRANVIEL
v.
JAMES A. LYNAUGH, Director
Texas Department of Corrections

CIVIL ACTION NO. CA-4-87-862-E

MEMORANDUM OPINION AND ORDER

An evidentiary hearing was held August 3, 1988, on the petition for writ of habeas corpus relief by state inmate Kenneth Granviel (T.D.C. No. 000511), who is confined at the Ellis Unit of the Texas Department of Corrections, Huntsville, Texas, pursuant to a sentence of death.

Petitioner Kenneth Granviel was present with his court appointed attorneys Danny D. Burns and Lee Ann Dauphinot, and Respondent was represented by Assistant Attorney General William Zapalac.

This evidentiary hearing was held pursuant to the July 19, 1988 Order of the Court providing in pertinent part:

> IT IS ORDERED that an evidentiary hearing be and hereby is set for Wednesday, August 3, 1988 at 9:00 a.m. in the Fifth Floor Courtroom, United States Courthouse, 10th and Lamar Streets, Fort Worth, Texas, before United States District Judge Eldon B. Mahon, which will be limited to:
>
> A. testimony, exhibits and other evidence to the issues of:
>
> 1. first - jury selection
>
> 2. eighth - witness Tim Steinmeyer - death penalty no deterrent
>
> 3. twelfth - competency of condemned
>
> B. argument of counsel on all issues except the eleventh issue.
>
> A separate order was entered on June 23, 1988 providing that Petitioner be brought to the greater Fort Worth area on or before July 27, 1988 for consultation with his counsel.

The Court finds that Petitioner and his counsel, although well aware of such issues to date, have not urged the possible issues of:

1. Ineffective assistance of counsel
2. McCleskey v. Kemp
3. Batson v. Kentucky

The Court seeks to afford Petitioner Granviel and his counsel the opportunity to offer any evidence deemed beneficial to Petitioner; however, the Court desires to hear all issues and evidence in one hearing. Petitioner is urged to, within ten days of this order, serve and file written pleading pointing out with specificity any issue misstated or misconceived, any additional issue Petitioner seeks to present, and any additional issue on which Petit...ner seeks to offer evidence during said evidentiary hearing.

Petitioner nor his counsel filed written pleading, nor orally advised the court of any misstated or misconceived issue, any additional issue Petitioner sought to present, nor any additional issue that Petitioner sought to offer evidence on during the evidentiary hearing.

Petitioner acting by and through his said counsel presented as witnesses:

1. Dr. Sechurana Srinivason
   Rusk State Hospital
   P.O. Box 318
   Rusk, Texas 75785-0318

2. Tom E. Hill
   Zachry, Kearney, Hill, Beatty & Butcher
   Attorneys at Law
   Suite 1300, 201 Main Street
   Fort Worth, Texas 76102

and introduced Plaintiff's Exhibit No. 1 consisting of sixty-eight (68) pages of records of the Rusk State Hospital, being mostly the material submitted as Defendant's Exhibit No. 1, and being Volume 53 during Granviel's competency jury trial.

Petitioner urged venireman Edgar Lincoln Curry was excluded under the teachings of Witherspoon v. Illinois, 391 U.S. 510 (1968), while he was not subject to disqualification because of his beliefs on the death penalty under the January 21, 1985 decision of the Supreme Court in Wainwright v. Witt, 569 U.S. 412 (1985).

[THE COURT]

"Q. ....Reverend...Would you always vote against death or are there circumstances under which you could vote for it if the evidence shows you you should?

"A. Irregardless I will not change my position, that I will not want to be in a position to have to decide whether a man would live or die.

"Q. All right.

"A. And I would vote that he live irregardless to whether the evidence was presented.

"Q. Every time?

"A. Every time.

"Q. Okay.

(T. 892).

Reverend Curry was properly excluded as a prospective juror. Ibid.

Petitioner offered no evidence on veniremen Pamela Norene Copeland and Tommy Orville King.

The first issue - jury selection - urged by Petitioner is without merit.

Petitioner offered evidence on the eighth issue - witness Tom Steinmeyer - death penalty no deterrent -- from the lead court-appointed trial attorney Tom E. Hill concerning the trial strategy of offering a statistical survey to show that the December 7, 1982 single execution of Charlie Brooks, Jr. [Brooks v. Estelle, 702 F.2d 84 (5th Cir. 1983)], after a several year period of no executions, failed to act as a deterent by the April 26, 1983 trial on the merits of Kenneth Granviel.

Petitioner, rather than stating a claim for habeas relief, is in fact attacking the constitutionality of the death penalty. This claim is without merit.

The final issue Petitioner sought to present evidence is his twelfth claim - competency of condemned - with sub-issues of (a) present, and (b) no procedure to determine, or refusal to utilize procedure available for other purposes. Petitioner's witness Dr. Sechurana Srinivason testified that in the about three-week stay of Petitioner at the

Rusk State Hospital, he examined Granviel on one occasion for about forty (40) minutes and on two other occasions he observed Granviel for about five (5) minutes each, with one meeting being January 21, 1983 at 11:00 a.m.; these meetings occurred in January and February 1983, prior to the February 14, 1983 beginning of the jury competency trial, with the jury finding Granviel competent to stand trial.

Attorney Tom E. Hill testified he did not feel Kenneth Granviel had the mental ability to assist his counsel.

The court noted the active participation of Kenneth Granviel in the evidentiary hearing, frequently disregarding his counsel, and at times, the court. Interestingly, the more Petitioner Granviel spoke, the less he was able to stay in his other world scenario.

The most compelling evidence on the true status of the mental competency of Kenneth Granviel are the hospital summary of Dr. David Muller, M.D. found at pages 64-65 of the proposed findings of the magistrate, and the testimony of the State's witness Johnny Bradford on February 17, 1983, during the competency hearing that he overheard Petitioner Granviel tell Woody Lourdes the night of Charlie Brooks execution:

> A. The moment they announced it on T.V. that Charlie Brooks was pronounced dead, Kenneth Granviel made a statement to Woody Lourdes that -- I forget the exact words, but pertaining to the -- Woody stated that, "I'm glad it was him and not me." Granviel then stated, "Well, I just hope that I can beat this;" something in that nature. He also stated that, "It looks like I'll miss that."... ..."It looks like I'll miss that meeting."

(S.F. 319-320).

Johnny Bradford testified at page 352 that Granviel, after declining being seen by some doctors, stated in substance, that if he did not say anything that the doctors could not make a mental determination of him.

During cross examination, Bradford testified that Kenneth Granviel turned his actions on and off like a T.V. set. (S.F. 371-372).

Woody Lourdes was Charlie Brooks' cousin and fellmate. After Lourdes' conviction was reversed on appeal, he made a plea bargain of pleading guilty to non-capital murder and was sentenced to forty years in prison. Brooks v. Estelle, 697 F.2d 586, 588 (5th Cir. 1982).

If the testimony of prisoner Johnny Bradford was not substantially accurate, the court knows trial counsel and habeas counsel each would have brought forth a repudiation by Woody Lourdes who was confined in the Tarrant County Jail from September 1980 to December 1982, and since that time has been confined in the Eastham Unit of the Texas Department of Corrections at Lovelady, Texas.

Finally, the court had jurisdiction of Petitioner Granviel on August 3, 1988, and had at least the inherent power to order a mental competency hearing of Kenneth Granviel.

The late Judge Leo Brewster in the analogus case of United States v. Smith, 436 F.2d 787, 789-790 (5th Cir. 1971),

> [4]...the trial judge, displaying commendable caution, offered to recess the trial for as long as necessary, so that the psychiatrist could conduct a further clinical interview. Smith's refusal to submit to this proferred examination forecloses his complaint that the initial interview was inadequate or prejudicial.

Neither counsel for Petitioner nor counsel for Respondent moved for an examination to determine the mental competency of Kenneth Granviel. The court had no reasonable cause to believe that Granviel may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceeding or to assist properly in his action; accordingly, the court on its own motion did not order a competency examination.

The court does not understand Petitioner Granviel to assert a Franklin v. Lynaugh, ___U.S. ___, ___S.Ct.___(1988)(No. 87-5546 dated 6-22-88) claim, which Mr. Justice White delineates as:

> In this case, we are called on to determine if the Eighth Amendment required a Texas trial court to give certain jury instructions, relating to the consideration of mitigating evidence, that petitioner had requested in the sentencing phase of his capital trial.

Judge Reavley in Penry v. Lynaugh, 832 F.2d 915, 925 n. 7 (5th Cir. 1987) notes the issue as:

> Whether the jury must be instructed on the effect of mitigating evidence under the Texas capital punishment scheme.

As Judge Reavley opines at page 926, the Fifth Circuit has already rejected a claim similar to any Granviel might seek to raise. Granviel v. Estelle, 655 F.2d 673, 675-677 (5th Cir. 1981), cert. denied, 455 U.S. 1003 (1982).

No need exists to require instructions as sought in Franklin v. Lynaugh, since the jurors of this state are entirely capable of reaching a just verdict without additional instruction plus defense counsel presented the relevant mitigating evidence and vigorously urged their belief of its mitigating effect. Defense counsel's final argument in the punishment phase is found in volume 46 beginning at page 1696, and in particular the cogent argument of Attorney Tom Hill beginning at page 1710 such as:

> And finally, the burden of proof remains on the State beyond a reasonable doubt through this trial. Anything that's occurred to you in the first phase of the trial, anything that's happened in this phase of the trial you can take that all into consideration, and if you have a reasonable doubt based on the mental condition or anything else that has occurred during the trial, the Court tells you to resolve that reasonable doubt to the -- to the benefit of the defendant....

(S.F. 1721).

As Judge Henderson held in the first Granviel case,

> ...the capital-sentencing statute is not unconstitutional as applied to Granviel.

Id. at 677.

After an independent review in this case and the said evidentiary hearing, the court finds that the findings and conclusions of the magistrate are correct and adopts such findings and conclusions as the findings and conclusions of the court.

The court has taken into consideration the pleadings, the findings and recommendation of the magistrate, the objections to magistrate's findings, the testimony, the exhibit, the arguments of counsel, and the pro se statements of Petitioner, and finds Granviel has failed to show he is entitled to habeas relief on the claims raised; accordingly,

IT IS ORDERED that habeas relief be and hereby is denied.

The court in a December 8, 1987 order granted a stay of execution in this case pending further order of the court. Habeas corpus review in a capital murder case presents serious issues. Brooks v. Estelle, supra, 702 F.2d 84.

The United States Supreme Court in Barefoot v. Estelle, 463 U.S. 880, 892-893 (1983) sets forth procedural guidelines for handling applications for stay of execution on habeas corpus appeals providing in part as follows:

> First. Congress established the requirement that a prisoner obtain a certificate of probable cause to appeal in order to prevent frivolous appeals from delaying the States' ability to impose sentences, including death sentences. (footnote omitted). The primary means of separating meritorious from frivolous appeals should be the decision to grant or withhold a certificate of probable cause. It is generally agreed that "probable cause requires something more than the absence of frivolity, and that the standard is a higher one than the 'good faith' requirement of Sec. 1915." Blackmun, "Allowance of In Forma Pauperis Appeals in Sec. 2255 and Habeas Corpus Cases," 43 F. R. D. 343, 352 (CAB 1967). We agree with the weight of opinion in the courts of appeals that a certificate of probable cause requires petitioner to make a "substantial showing of the denial of [a] federal right." Stewart v. Beto, 454 F.2d 268, 270, n. 2 (CA5 1971), cert. denied, 406 U.S. 925 (1972,. See also Ramsey v. Hand, 309 F.2d 947, 948 (CA10 1962); Goode v. Wainwright, 670 F.2d 941 (CA11 1982). (footnote omitted). In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause, but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.
>
> Second. When a certificate of probable cause is issued by the district court, as it was in this case, or later by the court of appeals, petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal....

A petitioner must make a substantial showing of the denial of a federal right before a certificate of probable cause should issue. The severity of the ultimate penalty in itself is insufficient to warrant an automatic issuance of a certificate.

The stay of execution in this case will be lifted by separate order.

SIGNED this 19th day of September, 1988.

UNITED STATES DISTRICT JUDGE

Appendix C

Kenneth GRANVIEL,
Petitioner-Appellant,

v.

James A. LYNAUGH, Director Texas Department of Corrections,
Respondent-Appellee.

No. 88-1818.

United States Court of Appeals,
Fifth Circuit.

Aug. 28, 1989.

Petitioner sought habeas corpus relief from death sentence imposed by Texas court in murder prosecution. The United States District Court for the Northern District of Texas, Eldon B. Mahon, J., denied relief. Petitioner appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) prospective jurors' strong opposition to death penalty was properly found by trial court to prevent their jury service; (2) exclusion of proffered, punishment phase evidence that death penalty did not deter crime was not constitutional error; (3) defendant waived any Fifth Amendment privilege against introduction of psychiatric testimony by raising insanity defense; and (4) admission of testimony that bailiffs had observed defendant striking attorney during confidential conference did not violate attorney-client privilege or render counsel ineffective.

Affirmed.

1. Jury ⇐108

Prospective juror may be excused for cause on basis of opposition to capital punishment only if prospective juror's views would prevent or substantially impair performance of duties as juror in accordance with instructions and oath.

2. Criminal Law ⇐1158(3)

Trial court's factual determination that potential juror is disqualified is presumed correct.

3. Jury ⇐108

Prospective jurors' strong opposition to death penalty was properly found by trial court to prevent jury service in capital murder prosecution; prospective jurors were unequivocally opposed to the death penalty and gave inconsistent responses regarding their ability to follow trial court's instructions.

4. Constitutional Law ⇐278(2)
Criminal Law ⇐1213.8(8)

The Eighth and Fourteenth Amendments require that defendant in capital case be permitted to present for jury's consideration during punishment phase any mitigating evidence regarding defendant's character, prior record, or circumstances of the defendant's crime, however, evidence that does not bear on defendant's character, record, or crime may properly be excluded by trial court. U.S.C.A. Const. Amends. 8, 14.

5. Homicide ⇐358(1)

Exclusion of proffered, punishment phase evidence that Texas death penalty does not deter crime was not constitutional error, in capital murder prosecution; efficacy of Texas capital statutes was irrelevant to defendant or his crime. U.S.C.A. Const. Amends. 8, 14.

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The Synopsis, Syllabi and Key Number Classifications constitute no part of the opinion of the court.

6. Criminal Law ⇐1091(1)

Defendant waived any Fifth Amendment privilege against introduction of psychiatric testimony by raising insanity defense in capital murder prosecution. U.S.C.A. Const.Amend. 5.

7. Criminal Law ⇐393(1)

Admission of psychiatrists' testimony did not violate defendant's Fifth Amendment rights, even though defendant was not given *Miranda* warnings prior to examination by psychiatrists; psychiatrists' testimony was introduced to rebut defendant's insanity defense, and psychiatrists did not reveal any admissions of defendant concerning crime. U.S.C.A. Const.Amend. 5.

8. Criminal Law ⇐641.3(1)

Defendant's Sixth Amendment right to the assistance of counsel in connection with psychiatric evaluations was not automatically waived by insanity defense in capital murder prosecution. U.S.C.A. Const. Amend. 6.

9. Criminal Law ⇐641.3(11)

Defendant was not entitled to assistance of counsel during psychiatric examination, which occurred five years prior to crime; at time of examination, defendant's Sixth Amendment rights had not attached. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.3(11)

Defendant's Sixth Amendment challenges to admission of psychiatrist's testimony in capital murder prosecution were waived by defense counsel's voluntary decision to seek to have psychiatrist appointed as disinterested qualified expert pursuant to applicable Texas procedure. U.S.C.A. Const.Amend. 6; Vernon's Ann.Texas C.C.P. art. 46.02.

11. Constitutional Law ⇐268.2(3)
Costs ⇐302.1

Indigent defendant had Fourteenth Amendment right to psychiatric assistance in capital murder prosecution, and the state had to provide such assistance to the defendant if defendant's sanity was likely to be significant factor at trial. U.S.C.A. Const. Amend. 14.

12. Costs ⇐302.1

Texas procedure providing indigent defendant with assistance of court-appointed psychiatrist, whose opinion and testimony is available to both sides, satisfied defendant's right to psychiatric assistance; defendant was not entitled to confidential assistance from expert whose report would not be available to prosecution and defense alike. U.S.C.A. Const.Amend. 14; Vernon's Ann.Texas C.C.P. art. 46.02.

13. Criminal Law ⇐517.2(1)

Defendant's statement that he wanted to ask lawyer legal question regarding title to car did not invoke right to counsel during interrogation and did not preclude admission of voluntary confession, in murder prosecution; statement unambiguously referred to matters unrelated to confession and interrogation, and the State's failure to provide free attorney to answer such request did not render confession involuntary. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐641.13(2)
Witnesses ⇐289

Admission of testimony that bailiffs had observed defendant striking attorney during confidential conference did not violate the attorney-client privilege or render counsel ineffective; defendant's action in striking attorney was not related to the rendering of legal representation. U.S.C.A. Const.Amend. 6.

15. Witnesses ⇐196(1)

Attorney-client privilege protects only those communications made in confidence for the purpose of obtaining legal advice.

16. Criminal Law ⇐981(2), 1213.8(8)

Eighth Amendment prohibition against cruel and unusual punishment condemns execution of insane prisoner; therefore, prisoner is entitled to adjudication of sanity prior to execution. U.S.C.A. Const.Amend. 8.

17. Criminal Law ⇐981(2)

Capital murder defendant was sane and thus could be executed; applicable Texas procedures constitutionally adjudicated defendant's sanity, and evidentiary hearing on issue of defendant's sanity was held by federal court, which denied requested relief in proceeding on habeas corpus petition.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, and WILLIAMS and GARWOOD, Circuit Judges.

CLARK, Chief Judge:

Kenneth Granviel appeals from the federal district court's denial of habeas corpus relief from his death sentence imposed by a Texas court. We affirm.

I.

On February 8, 1975, Kenneth Granviel confessed to the inhuman torture and murder of six women and one of the victim's two-year-old son. Seven years later in July of 1982, Granviel was indicted for one of these murders, the murder of Natasha McClendon committed in the course of aggravated rape. His trial began in March of 1983, and on May 5, 1983, the jury found Granviel guilty of capital murder. After a separate punishment proceeding before the same jury, the jury answered affirmatively the special issues needed to impose a death sentence under Texas law. Tex.Code Crim. Proc.Ann. art. 37.071 (Vernon 1981). (This statute was amended after Granviel's trial. *Id.* at Supp.1989). Granviel's conviction was affirmed on appeal, 723 S.W.2d 141, and the United States Supreme Court denied certiorari in October of 1987. He was then denied collateral relief in state court. On December 7, 1987, Granviel filed his petition for writ of habeas corpus in the United States District Court of the Northern District of Texas, Fort Worth Division. After an evidentiary hearing was held on two of Granviel's claims, the district court denied the requested relief and dismissed the petition in August of 1988. This appeal followed.

Granviel raises a number of claims concerning the conduct of his trial. He also questions his present sanity. We address each claim individually.

II.

Granviel argues that two prospective jurors, the Reverend Edgar Lincoln Curry and Priscilla Norene Copeland, were improperly excused for cause on the basis of their opposition to the death penalty. *Wainwright v. Witt*, 469 U.S. 412, 105

471, 841, 83 L.Ed.2d 841 (1985); *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[14-17] A prospective juror may be excused for cause on the basis of the veniremember's opposition to capital punishment only if "those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams*, 448 U.S. at 45, 100 S.Ct. at 2526. Because of the difficulty of assessing a prospective juror's state of mind, particularly on a cold record, we pay deference to the trial court's factual determination that a potential juror is disqualified. The fact determination is presumed correct. *Witt*, 469 U.S. at 428-29, 105 S.Ct. at 852-53. Applying this presumption to the facts of this case, we see no grounds for disturbing the decision of the lower court. Both veniremembers in question were unequivocally opposed to the death penalty and gave inconsistent responses regarding their ability to follow the trial court's instructions. *See Ellis v. Lynaugh*, 873 F.2d 830, 832-37 (5th Cir.1989).

1. The Reverend Edgar Lincoln Curry

At the conclusion of a long voir dire examination, the Reverend Curry stated that he did not wish to take the oath of a juror because of his opposition to the death penalty. Granviel contends that Curry was persuaded to take this position by the prosecuting attorney's suggestion that he could thereby avoid the unpleasant task of sitting in a capital case. In Granviel's view, Curry was improperly encouraged to abandon his clear statement that he would follow his oath and answer truthfully to all questions presented to him. Reviewing the transcript of the voir dire, however, we conclude that the prosecutor was properly fulfilling his duty to flush out Curry's true position.

The Reverend Curry's responses to questions make it clear that serving on a death penalty case placed him in a moral dilemma. This was particularly true under the Texas procedure, which mandates a death sentence if the jury affirmatively answers three special issues or questions. The Reverend Curry strongly opposed the death penalty due to long held moral and religious beliefs and stated explicitly that he could not conscientiously participate in its imposition. These same convictions, however, also compelled him to follow his oath and answer truthfully all questions presented to him; he would not lie. Therefore, when asked if he would truthfully answer the special issues that Texas law utilizes in the penalty stage of capital cases, Curry stated unequivocally that he would answer as the evidence dictated. The dilemma created by the Texas procedure then became apparent: assuming the facts of the case warranted the death penalty, Curry had either to answer the questions falsely or answer them as the facts dictated, and thereby sentence another to death. Curry could abide by neither result.

[by the Prosecutor]

Q. Now, earlier you said that your opinions about the death penalty were so firm that you would automatically vote against the death penalty regardless of the facts of the case?

A. Irregardless.

Q. All right.

Now, is what you're telling the judge, then, that even if you were convinced beyond a reasonable doubt, for example, that the defendant acted deliberately and there was a reasonable expectation that his actions would result in the death of another, that you might answer no to that question when in fact in your heart you knew the answer was yes?

A. Oh, no, I wouldn't do that. I wouldn't lie about it.

Q. Now, the second question [special issue] is—we're talking about whether there's a probability he would commit criminal acts of violence?..... If you were convinced of that beyond a reasonable doubt, could you answer yes to that knowing that you have already answered yes to the first question and knowing that the two yes answers just—

A. Two yes answers would give him—

Q. —give him the death penalty?

A. —death penalty.

Q. Could you do that?

A. I would answer it truthfully if I was on the jury, yes.

Q. You could do that?

A. Yes.

Q. All right.

Now, here is the—the oath that you'll have to take as a juror.

And what that oath says is that you will a true verdict render according to the law and the evidence, so help you God?

A. That's right.

Q. Okay, so if you take that oath, then you're telling—I guess what you are telling us now is that even though you're—you're adamant in your opposition of the death penalty, if you take an oath to render a true verdict, then you will render a true verdict and it won't matter to you whether d...'s results or not?

A. I'm liable to be put in the position by telling the truth of what I have heard and what I understand that would transpire as a juror would place me in this position that I couldn't—I would have to go against what I believe, staunchly believe in, and that I would demand then that he be given capital punishment and whatever you said it was, an injection or something, lethal injection, and I don't want to be placed in that position.

From this record, the district court could properly conclude that the facially inconsistent answers of Curry did not result from any inconsistency in Curry's personal views but from the Texas death penalty procedure. Curry's position did not change during the lengthy voir dire. He and the court were made to recognize the dilemma he was being placed in and an appropriate solution was found.

B. Pamela Norene Copeland

Like the Reverend Curry, Pamela Norene Copeland was adamant in both her opposition to the death penalty and her insistence that she would answer all questions presented to her truthfully. Only after an extensive examination by the attorneys for the prosecution and the defense, and the court did Copeland realize the contradiction in her answers. For example:

Q. [by the court] Mrs. Copeland, there's a matter that we need to clear up at this point.

You have told Mr. Wilson in response to his questions by the State in essence that your feeling about the death penalty is such that you could never serve on a jury in which you could vote for the imposition of the death penalty in any case, regardless of what the facts are; right?

A. I'm sorry. I'm getting confused now.

Q. Okay. I'm trying to unconfuse you.

You have told Mr. Wilson that you have a very strong feeling in opposition to the death penalty in any criminal case?

A. Yes.

Q. That you feeling is so strong in that regard that you could not serve on a jury and vote in such a manner that the death penalty would be imposed on a juror, regardless of what the facts are; right?

A. Right.

Q. Okay. You have now told Mr. Beatty that you could answer those two or three questions in the penalty phase of a capital murder case yes if the evidence said that you should answer them yes?

A. This was if I was on the jury.

Q. Okay.

A. I—

Q. Uh-huh. All right. Go ahead.

A. Did I just cross my answers?

Q. You sure did.

We need—you have told the State you cannot and told the defense you can, and all we need to know is which way it is?

A. Okay. If I was on, which I know—I could never say that he should die, whoever, but I could listen—this is where I thought the questions were coming from. I thought I could listen to the evidence and answer these questions yes, but when it came to the point of saying I thought he should die, I can't.

In both these cases, the prospective juror was emphatic in stating that he or she could never impose a death sentence. Nor was there any hint that they were seeking to avoid jury service. Copeland, as the mother of a nine year old son, had a statutory exemption from jury service that she declined to invoke. Any conflict in their answers resulted from the structure of questioning required by the Texas death penalty procedure. The strong opposition to the death penalty of these prospective jurors was properly found by the trial court to prevent their jury service.

III.

During the punishment phase of the trial, the trial court refused to permit an expert witness to testify on Granviel's behalf that the death penalty does not deter crime. Granviel contends that this exclusion prevented him from presenting mitigating evidence that should have been considered by the jury. *See Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

[4, 5] The eighth and fourteenth amendments require that the defendant in a capital case be permitted to present for the jury's consideration during the punishment phase any mitigating evidence regarding the defendant's character, prior record, or the circumstances of the defendant's crime. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964–65, 57 L.Ed.2d 973 (1978). However, evidence that does not bear on the defendant's character, record, or crime may properly be excluded by the trial court. *Id.* at 604 n. 12, 98 S.Ct. at 2965 n. 12; *Brock v. McCotter*, 781 F.2d 1152, 1158 (5th Cir.), *cert. denied*, 476 U.S. 1153, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986). The evidence proffered by Granviel concerning the efficacy of Texas capital statutes was irrelevant to the defendant or his crime, and therefore, the exclusion of such evidence was not constitutional error.

IV.

Granviel raised an insanity defense at trial. In response to the defense, the state introduced the testimony of two psychiatrists, Drs. Holbrook and Groves, who had previously examined Granviel. Dr. Holbrook originally had examined Granviel to determine his competency to stand trial on related charges, and had concluded that Granviel was sane at the time of his examination. Dr. Holbrook died during the period between the first trial and the trial in issue, so his testimony was introduced through the trial transcript of the earlier trial. Dr. Groves examined Granviel when he was a juvenile. Granviel contends that the admission of the testimony of both psychiatrists violated his right against self-incrimination and to the effective assistance of counsel because he was not given *Miranda* warnings prior to the psychiatrists' examinations. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Granviel again objected at the punishment phase of his trial. He asserted that the introduction of this evidence violated the strictures of *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866. He asked that the jury be instructed not to consider the testimony. The objection and requested instruction were denied.

A. Granviel's Fifth Amendment Claim

[6, 7] Granviel waived any fifth amendment privilege against the introduction of the psychiatric testimony. He raised the question of his sanity. The prosecution rebutted that claim with the testimony of these examining psychiatrists. Raising an insanity defense constitutes a waiver of the defendant's protection against self-incrimination with regard to psychiatric testimony. *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 2917–18, 97 L.Ed.2d 336 (1987). *Schneider v. Lynaugh*, 835 F.2d 570, 577 (5th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 87, 102 L.Ed.2d 63 (1988). Here, as in *Buchanan*, the psychiatrists' reports were introduced to rebut the defendant's insanity defense. The psychiatrists did not reveal any admissions of the defendant concerning his crime. Therefore, the admission of their testimony, despite the fact that Granviel was not given *Miranda* warnings prior to either examination, did not constitute a violation of Granviel's fifth amendment rights. *Buchanan*, 107 S.Ct. at 2918.

B. Granviel's Sixth Amendment Claims

[8] Unlike Granviel's fifth amendment right, his sixth amendment right to the assistance of counsel was not automatically waived by his insanity defense. *Powell v. Texas*, — U.S. —, —, 109 S.Ct. 3146, 3148–50, — L.Ed.2d — (1989) (per curiam). In *Powell*, the Supreme Court clarified the distinction between a defendant's fifth *and* sixth amendment rights in regard to psychiatric testimony. The Court recognized the inherent inequity in permitting a defendant to raise an insanity defense while objecting to disclosure of psychiatric evaluations. The Court reasoned, however, that such inequity did not justify denying the defendant assistance of counsel during such examination. *Id.* — U.S. at —, 109 S.Ct. at 3148–49.

1. *Dr. Groves*

[9] Granviel had no sixth amendment claims as to the admission of Dr. Grove's testimony. Dr. Groves examined Granviel in 1969, five years prior to Granviel's crime and well before adversary proceedings were initiated against him. Therefore, Granviel's sixth amendment rights had not attached, and he was not entitled to the assistance of counsel during Dr. Groves' examination. *Kirby v. Illinois*, 406 U.S. 682, 689-90, 92 S.Ct. 1877, 1882-83, 32 L.Ed.2d 411 (1972).

2. *Dr. Holbrook*

[10] Dr. Holbrook was initially retained by Granviel's counsel in preparation for a trial on charges related to one of Granviel's seven other victims and while Granviel was under arrest for the present murder. Dr. Holbrook interviewed Granviel twice, on both occasions Granviel was accompanied by defense counsel. After these examinations, defense counsel petitioned the court to appoint Dr. Holbrook as a court psychiatrist, in order to have him paid by the State.

The appointment was made pursuant to article 46.02 of the Texas Code of Criminal Procedure. On the day that the appointment was requested, article 46.02 provided that the "court may at its discretion appoint disinterested qualified experts to examine the defendant with regard to his present competency to stand trial and as to his sanity. . . ." The statute prohibits the court-appointed psychiatrist from testifying concerning statements made by the defendant. *Id.* As interpreted by the Texas Court of Criminal Appeals, this statute contemplates the appointment of a disinterested expert for the court, who will not serve as a partisan for either side. *Granviel v. State*, 552 S.W.2d 107, 115 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977). Prior to the time of trial, the relevant statute was amended so as to require that a copy of the disinterested expert's report be furnished to the court and opposing counsel. Tex. Code of Crim.Proc. art. 46.02, § 3(d) (effective June 19, 1975). Under Texas law, an amendment to a procedural statute governs the conduct of a trial from its effective date. *Granviel*, 552 S.W.2d at 110.

Pursuant to the amended statute, the trial court ordered Dr. Holbrook to release a copy of his report to the State. Dr. Holbrook complied, over the objection of defense counsel. Counsel also objected to the use of Dr. Holbrook's report on both fifth and sixth amendment grounds prior to its use at Granviel's first trial on related charges, by motion prior to the instant trial, and during the course of the instant trial when the report was introduced and prior to the punishment phase of the trial.

Granviel's sixth amendment challenges were waived by his counsel's voluntary decision to seek to have Dr. Holbrook appointed as a disinterested, qualified expert pursuant to the Texas procedure. Even under the statute's earlier formulation, the expert to be appointed was not to be a private consultant of either party. Rather, he was to be the court's disinterested expert. As such, it was proper for his opinions to be made available to either party equally. *Granviel*, 552 S.W.2d at 115. Granviel moved to have Dr. Holbrook appointed as a court expert with the advice of counsel who had been present during the doctor's examination and were thus aware of the nature and scope of the expert's examination and opinion. Granviel's counseled requests obviate any basis for objection that the availability of Dr. Holbrook's testimony might have violated his constitutional rights.

3. *Article 46.02*

Granviel also challenges the constitutionality of the Texas procedure requiring the disclosure of an appointed psychiatrist's report. Tex.Code Crim.Proc. art. 46.02. Prior to his trial on the instant offense, Granviel requested that the court appoint an independent expert to assist him in his defense. He specifically requested that the expert be unavailable to the prosecution or the court. The request for such confidential expert assistance was denied, although the court did appoint a disinterested expert whose report would be available to prosecution and defense alike.

[11, 12] Granviel alleges that the unavailability of an independent expert denied him the opportunity to meaningfully defend himself. Granviel has a fourteenth amendment right to psychiatric assistance, and the state must provide such assistance to an indigent defendant such as Granviel if the defendant's sanity is likely to be a significant factor at trial. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). As Granviel's sanity was certainly in genuine dispute, the only remaining question is whether the Texas procedure that provides an indigent defendant with the assistance of a court-appointed psychiatrist, whose opinion and testimony is available to both sides, satisfies Granviel's rights. We hold that it does.

As the Texas Court of Criminal Appeals has noted, "A psychiatrist's examination is not an adversary proceeding. Its purpose is not to aid in the establishment of facts showing that an accused committed certain acts constituting a crime, rather its sole purpose is to enable an expert to form an opinion as to an accused's mental capacity to form criminal intent." *Shultz v. State*, 509 S.W.2d 853, 855 (Tex.Crim.App.1974), *quoted in Granviel*, 552 S.W.2d at 115. Granviel's ability to uncover the truth concerning his sanity is not prejudiced by a court-appointed, neutral expert. Availability of a neutral expert provides defendants with "the raw materials integral to the building of an effective defense." *Ake*, 105 S.Ct. at 1092. The state is not required to permit defendants to shop around for a favorable expert. Granviel had been provided with an unbiased expert of his own choosing in the first trial and examination at the facility of his choice before the second. He does not contend that the chosen experts were incompetent. He has no right to the appointment of a psychiatrist who will reach biased or only favorable conclusions.

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

Id. at 1096. The Texas procedure complies with the mandate of the Constitution.

V.

[13] Granviel alleges that his confession was obtained in violation of his right to counsel because the prosecutor ignored his request for counsel during his interrogation. The clear factual record before this court, however, belies that conclusion.

On February 8, 1975, hours after he murdered one of his seven victims, Granviel voluntarily entered the police station, accompanied by his pastor, and requested to speak to an officer. He orally confessed to committing seven murders and five rapes. He and two detectives then went to the apartment containing Granviel's latest victim, neither of whom was Natasha McClendon. After returning to the station, Granviel's oral confession was reduced to writing, and Granviel was asked to sign the typed confession.

It was after his voluntary oral confession and prior to signing the written confession that Granviel allegedly invoked his right to counsel. Prior to signing the statement, after having been told again of his right to have a lawyer appointed to represent him, Granviel stated that he wanted to ask a lawyer a legal question regarding the title to his car. Granviel was provided a phone book and a phone. Granviel shrugged off the phone, saying it was not important, and signed the written confession. At trial, defense counsel objected to the introduction of the confession on the ground that it was given involuntarily and without the assistance of counsel. The trial court conducted a hearing outside the presence of the jury and overruled the objection. *See Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

While the right to counsel during interrogation is an important element of an effective right against self-incrimination, Granviel's statement did not invoke the right. Granviel's statement unambiguously referred to matters unrelated to his confession and interrogation. He was apparently concerned with the disposition of his property while incarcerated, not with admitting his crime. The State is not required to provide a free attorney to answer such a request, and it does not render his confession involuntary. *See Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

VI.

During the punishment phase of the trial, the State offered the testimony of two bailiffs. The bailiffs had observed Granviel striking his attorney during a confidential conference. Granviel argues that the admission of such testimony violated the attorney-client privilege and rendered his counsel ineffective.

[14, 15] The essence of Granviel's objection is the confidentiality of the attorney-client relationship. While incarcerated, a defendant is subject to state supervision, so attorney-client confidentiality must be jealously protected. However, Granviel's action in striking his attorney was not related to the rendering of legal representation and thus was not protected by the attorney-client privilege or the Constitution. The attorney-client privilege protects only those communications "made in confidence for the purposes of obtaining legal advice." *Wells v. Rushing*, 755 F.2d 376, 379 n. 2 (5th Cir.1985). Likewise, Granviel's right to counsel was not compromised by the revelation of an act unrelated to his defense.

VII.

[16] The eighth amendment prohibition against cruel and unusual punishments con-

demns the execution of an insane prisoner. *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986). Accordingly, a prisoner is entitled to an adjudication of his sanity prior to execution. *Id.*, 106 S.Ct. at 2602-03. Granviel contends that he is presently insane and that the Texas procedures for determining his sanity are constitutionally defective.

[17] Prior to his scheduled date of execution, Granviel filed a writ of habeas corpus in the state convicting court. The state court held a hearing in which Granviel was represented by counsel, presented witnesses, and was permitted cross-examination. A psychiatrist was also appointed by the court. Although Granviel refused to respond to the psychiatrists' questions, the doctor testified that he concluded through observation alone that Granviel was sane and competent. Granviel points to no part of this procedure as defective, other than his voluntary refusal to answer questions. The state procedure constitutionally adjudicated Granviel's sanity. *See Evans v. McCotter*, 805 F.2d 1210 (5th Cir. 1986).

Granviel's rights were further protected by the federal courts. An evidentiary hearing on the issue of Granviel's present sanity was held by the federal court below. The requested relief was denied. Granviel is sane.

VIII.

Based on the foregoing, the judgment of the district court is AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Appendix D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-1818

U.S. COURT OF APPEALS
FILED
SEP 28 1989
GILBERT F. GANUCHEAU
CLERK

KENNETH GRANVIEL,

Petitioner-Appellant,

versus

JAMES A. LYNAUGH, Director
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING

(September 28, 1989)

Before CLARK, Chief Judge, WILLIAMS and GARWOOD, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

Charles Clark
United States Circuit Judge

REHG-4

Appendix E

BY MR. HILL:

Q. Mr. Honeycutt, will you state your full name, please?

A. Basil Honeycutt.

Q. And you're the bailiff assigned to the 213th District Court; is that correct?

A. That's correct.

Q. You have been contacted by the State's attorneys requesting you to testify in this punishment phase of the trial; is that correct?

A. That's right.

Q. And their request to you is that you testify regarding acts that you have seen as you have been the bailiff in this court; is that correct?

A. That's right.

Q. Could you specifically tell me and the Court what you have been requested to testify about?

A. About the event happened back in the holdover.

Q. What's that event?

A. To Mr. Granviel's slapped Mr. Beatty.

Q. All right, and you witnessed that; is that correct?

A. I did, yes, sir.

Q. Now, let me ask you: That's what you understand that your testimony in this punishment phase is to be involved

with?

A. Yes, yes.

Q. Let me ask you this, too, please: This jury was sequestered on what date, approximately?

A. It's been about ten or twelve days ago.

Q. And have you been one of the bailiffs that have been attending the jury while they have been sequestered?

A. I have.

Q. And does that mean that you have been with them a lengthy period of time when we were not actually in the courtroom proceedings?

A. Yes, I have.

Q. Does that mean that you have taken them to lunch and eaten lunch with them?

A. Right, sir.

Q. Breakfast with them?

A. Right.

Q. Supper with them?

A. Right.

Q. Get them into the hotel in the evening and get them situated after supper?

A. That's correct.

Q. You have had a number of conversations with the jury since they have been sequestered; is that correct?

A. Oh, yeah.

Q. They look to you to get them where they are supposed to be and when they are supposed to be at the appropriate time; is that correct?

A. That's right.

Q. And you have had contact with them in that capacity during -- throughout the course of their being sequestered; is that correct?

A. I have, sir.

Q. And you wear a distinctive uniform of the Sheriff's Department; is that correct?

A. Right, sir.

MR. HILL: That's all I have for this Bill, Your Honor.

THE COURT: Mr. Pipes?

VOIR DIRE EXAMINATION

BY MR. PIPES:

Q. Mr. Honeycutt, you haven't attempted to relate any of the conversation -- or, excuse me, any of the information that we intend to talk about in the presence of the jury, that being the occasion back in February during the competency hearing when you witnessed the defendant strike the defense attorneys back in this little holdover off ---

A. I have not.

Q. --- to the right?

A. Have not.

Q. And, of course, you didn't have any choice in the assignment of being the bailiff and being sequestered with the jury and having those responsibilities, did you?

A. No, I did not.

Q. You haven't attempted to ingratiate yourself with the jurors with an effort toward their lending your testimony more credibility, have you?

A. No, I have not.

Q. Okay.

MR. PIPES: That's all the questions we would have.

FURTHER VOIR DIRE EXAMINATION

BY MR. HILL:

Q. Mr. Honeycutt, Mr. Beatty and I have made extensive efforts to try to visit with Mr. Granviel during our representation of him; is that correct?

A. Yes, that's right.

Q. And we have met with very much resistance in being able to talk to him?

A. Yes.

Q. Now, this occasion that you're prepared to testify to, this was a situation where we were attempting -- Mr. Beatty was attempting to discuss with him certain matters in an attorney-client relationship; is that correct?

A. That's correct, yes.

Q. And you were in a position to overhear that?

A. Right, sir.

MR. PIPES: Well, Your Honor, we don't anticipate offering any conversation -- if it's -- if conversation is elicited, it will be at the behest of the defense attorneys and we will not ask any question which was -- which is designed or attempting to elicit any statement made, but rather we're interested in showing the jury the act, and if they want to set the circumstances or the conversation, that's -- that's their prerogative, at least as far as we're concerned.

THE COURT: Thank you, Mr. Pipes.

You may proceed.

MR. HILL: That's all the questions I have.

I have a statement to make to the Court.

THE COURT: Yes, sir.

MR. HILL: Your Honor, there is -- was not anticipating Mr. Honeycutt to testify, so I haven't had an ample opportunity to brief it.

There is some authority of a case that happened out in Dawson County, Lamesa, Texas, in which a person was convicted of being a habitual criminal and a fact witness was brought who was the sheriff of that county, and he was also brought in as the

bailiff that attended the jury in that particular case. The case was reversed either by United States District Court on writ or by the Fifth Circuit Court, at least I recall, a theory that that bailiff had become an extension of the Court; it had -- he is cloaked with the (pause) credibility of the Court and therefore is not a competent witness and a fact witness in a case because he has had the opportunity to gain the confidence and be around the jurors, contrary to any other type of witness.

We would further object to Mr. Boneycutt testifying, Your Honor, because the Court was informed of this alleged occurrence for the benefit of the Court and for the benefit of the information of the Court. We feel like that it's improper tender and offer of proof.

THE COURT: State wish to respond to the defense argument?

MR. HILL: Your Honor, they testified to it, and he's attempting to invoke -- and I'm not sure I understand a portion of his argument, but if he's attempting to invoke the privilege, they testified to it in a hearing on competency issue. I don't think that argument should have any merit.

THE COURT: Mr. Hill, it is the recollection of

the Court that the Dawson County case to which you refer was a situation in which the sheriff in question appeared and gave testimony with regard to the facts of the case on trial as distinguished from any actions outside that ambit. It's the Court's impression that that is the point on which that went off.

The Court would distinguish that situation from this in that apparently from the testimony of Mr. Boneycutt he appears as a witness only to an alleged assault occurring back in the holdover cell. Before allow -- I will deny your motion to suppress the testimony of the witness.

MR. HILL: No objection.

THE COURT: Before going forward in the presence of the jury, however, I will caution counsel for both sides that the attorney privilege would be very much in evidence and in effect as to any conversation that may have transpired between the defendant and his counsel on any such occasion.

Mr. Boneycutt, you understand you are not to testify as to any conversations between either Mr. Hill or Mr. Beatty and the defendant?

THE WITNESS: Yes.

THE COURT: All right. All right.

Let's have the jury back in.

(jury present)

THE COURT: Thank you, ladies and gentlemen. You may proceed.

TRIAL ON PUNISHMENT

STATE'S DIRECT EVIDENCE

Whereupon,

BASIL HONEYCUTT

having been previously examined, testified before the jury as follows:

DIRECT EXAMINATION

BY MR. PIPES:

Q. Would you state your name for the record, please sir?

A. Basil Honeycutt.

Q. How are you employed or occupied?

A. I'm a bailiff in 213th District Court.

Q. How long have you been a bailiff with the Tarrant County Sheriff's Department assigned to the 213th?

A. Almost two years.

Q. Prior to that time what was your employment or occupation?

A. Police officer out in Arlington.

Q. How long were you a police officer in Arlington?

A. 20 years.

Q. During February of this year were you employed in the same capacity as a bailiff assigned to the 213th District Court?

A. I was.

Q. Did you have an occasion to work during the trial, the competency trial of Kenneth Granviel?

A. Yes, I did.

Q. Did you have occasions to have the defendant, Kenneth Granviel, in your custody?

A. Yes.

Q. And is the Kenneth Granviel who was -- who had a hearing on his competency to stand trial back in February, is he here in the courtroom?

A. He is.

Q. And would you point him out for the Court and the record?

A. (pointing) Sitting right over here.

MR. PIPES: Your Honor, may the record reflect the witness has pointed to the defendant?

THE COURT: Yes, sir.

BY MR. PIPES:

Q. Did you have an occasion -- during that trial were there occasions when the court would be in recess?

A. Yes.

Q. And on those occasions did you take the defendant

from the courtroom back into the holdover cell to my right and to your left, the only door on the north wall?

A. That's correct.

Q. Okay, and did you have an occasion to be present at a time in that holdover area when the defendants -- the defendant and both Mr. Hill and Mr. Beatty were present?

A. Right, sir.

Q. During that time did you have an occasion to witness the defendant do anything with regard to Mr. Beatty?

A. I did, sir.

Q. And would you tell the jury what you witnessed the defendant do?

A. Well, Mr. Granviel slapped Mr. Beatty one day back there.

Q. And would you tell the jury what he slapped Mr. Beatty with and where he hit him?

A. Well, with with his open hand upside of the head on the ear.

Q. On the ear?

A. Yeah.

Q. Okay. Did you do anything in response to that?

A. Oh, yes. I grabbed Mr. Granviel and he said he give up.

Q. Did he struggle with you at all?

No, he didn't.

Q. Okay. Were there other -- was anybody else called to that area?

A. No, I don't believe they were.

Q. But he did -- he did slap Mr. Beatty?

A. He did, sir.

Q. Did this did -- did you witness any action on the part of Mr. Beatty reacting to or moving as a consequence of that?

A. He just backed away.

Q. Okay.

MR. PIPES: We'll pass the witness.

CROSS EXAMINATION

BY MR. HILL:

Q. Mr. Honeycutt, how many times, best you can estimate, have you handled Kenneth Granviel in courtroom proceedings?

I know that may be difficult, but ---

A. Oh, I imagine five, 600 times anyway, probably.

Q. Okay. At no time has he given you any trouble whatsoever?

A. No, not a bit.

Q. In fact, you would say that he'd been a model prisoner?

A. Right.

Q. And was there an occurrence here in the last week

to ten days in which you or another bailiff had a gun on, contrary to sheriff department rules?

A. Right.

Q. And who was that person?

A. That was myself and one more.

Q. Okay, and it was an oversight on your part based on the -- on the rules of ---

A. Correct.

Q. -- of the course as you don't have weapons around anyway that you're handling; is that correct?

A. Right.

Q. And you forgot to do it one day?

A. Sure did.

Q. And you went all the way up into the jail with Mr. Granviel?

A. Right.

Q. And you had your pistols on you at that time; is that correct?

A. That's correct.

Q. Mr. Granviel didn't attack you or try to take your pistols away from you?

A. No.

Q. Never tried to escape?

A. No.

Q. Other than the incident that you have talked

about, have you ever seen Mr. Granviel take any type of an aggressive move except for when Mr. Pipes was taunting him yesterday in his argument?

A. I have not.

Q. He wasn't handcuffed or anything like that on the elevator going back up?

A. No.

Q. You're not aware of him causing any problems in the jail?

A. Not a bit.

MR. HILL: That's all I have, Your Honor.

REDIRECT EXAMINATION

BY MR. PIPES:

Q. Well, let me ask you, Mr. Honeycutt: Do you recall an occasion when there was a pre-trial hearing in which the defendant was attempting to address the Court and the Court had instructed the defendant to take his seat? Do you recall such an occasion?

A. Yes, I do.

Q. Okay, and during that time did you have an occasion to come toe-to-toe and eye-to-eye with Mr. Granviel?

A. Yes.

Q. And at that point did it appear that there would be something more could happen in that situation?

A. It could have, yes.

Q. Was he a little upset at that point, did it appear to you to be?

A. Yeah, he was, yeah.

MR. HILL: We'll pass the witness.

RECROSS EXAMINATION

BY MR. HILL:

Q. And in that occasion that you're talking about, there appeared to be some misunderstanding about what was happening in the court proceedings?

A. Yes, that's right.

MR. HILL: That's all I have.

THE COURT: You may step down, Mr. Honeycutt.

(witness resumes his place in bar area)

MR. PIPES: Your Honor, we would call Harry Millerd.

THE COURT: Mr. Millerd.

Do you solemnly swear the testimony you're about to give in the trial of this case will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: Be seated, please.

MR. HILL: Your Honor, we would register the same objection as we have in the hearing?

THE COURT: The objection is overruled.

You may proceed, Mr. Pipes.

Whereupon,

HARRY MILLERD

having been called as a witness on behalf of the State, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. PIPES:

Q. Would you state your name, please?

A. Harry Millerd.

Q. And how are you employed or occupied?

A. I'm a Deputy Sheriff, Tarrant County, Texas, assigned to the 213th as a bailiff.

Q And how long have you been a Deputy Sheriff?

A. About three months.

Q. Okay. Prior to that time how were you employed or occupied?

A. I worked at Burdock Machine Engineering for 10 years and I worked at Pratshell and Billow Fabricating in Mansfield.

Q. Did you have an occasion to be -- now, would you describe for the jury the way the holdover system immediately to the north of this courtroom, how it is connected there, to the jury?

A. We have a holdover area, you have a room with a

holdover tank in it and the elevators carry you up to the floors.

Q. When you have a -- when you say a tank, is that a cage or barred area sectioned off inside the -- actually inside the area of the jail?

A. Right.

Q. Okay, so there's -- there's one room immediately outside this door?

A. Yes.

Q. And then that leads into the area where the tank is and the elevators?

A. Yes.

Q. Okay. Did you have an occasion to be in the area on -- since your employment when the defendant was in the tank and his defense attorneys were in that area there between the tank and the elevators?

A. Yes, sir.

Q. And did anything unusual happen on that occasion?

MR. HILL: Your Honor, may I take him on voir dire?

THE COURT: Yes, you may.

VOIR DIRE EXAMINATION

BY MR. HILL:

Q. Mr. Millard, did you see anything happen?

A. Yes, sir.

Q. And how was that?

A. You and Mr. Beatty ---

Q. Not what you saw.

How were you able to see?

A. Through the glass in the door that goes into the holdover area.

Q. Wasn't something you heard? Something you say you saw?

A. You asked me did I see it?

Q. Yes.

A. Yes.

Q. Okay.

MR. HILL: That's all.

THE COURT: You may proceed, Mr. Pipes.

DIRECT EXAMINATION CONTINUED

BY MR. PIPES:

Q. Okay. Were you actually in the holdover area?

A. No, sir.

Q. Or were you in this immediate ante-room here?

A. Right in the hallway by the holdover.

Q. Does the door to the jail area, that being the area where the -- where the elevators are and the holdover tank -- is there a glass window in that door?

A. Yes, sir.

Q. Okay, and were you -- did you have an occasion to

actually see what you're about to describe for the jury?

A. Yes, sir.

Q. Okay, and would you tell the jury what you saw occur?

A. Mr. Hill and Mr. Beatty was in talking to Mr. Granviel and he seemed to be irate or whatever. I was watching through the glass as Mr. Granviel reached through the bars and grabbed Mr. Hill by the tie area.

Q. Did he actually -- did he succeed in grabbing the tie or could you tell from where you were?

A. I couldn't tell how good a hold he got on it because once I seen him reach through the bars, I went to open the door and I didn't see till I got the door open, and they were coming out then. It was Mr. Beatty and Mr. Hill and a lady with them. I don't know who.

Q. Okay, but he did grab for the tie?

A. Yes, sir.

Q. Now, could you tell generally what period of time this happened? Was that during the -- was that in February during the competency trial or has it been since February?

A. It's been since February. I'd say it was approximately three weeks ago, I guess.

Q. Okay. Before the jury was actually finally selected?

A. Yes, sir.

MR. PIPES: We'll pass the witness, Your Honor.

CROSS EXAMINATION

BY MR. HILL:

Q. You're not sure whether in fact the tie was grabbed or not, are you?

A. I couldn't tell exactly whether it was the tie or coat. I could see pulling, but I couldn't tell you exactly what part of the material he had 'cause I went to open the door at that time.

Q. And you as -- have indicated you have been attendant with the jury during the sequestered process; is that correct?

A. Yes.

MR. HILL: That's all I have, Your Honor.

REDIRECT EXAMINATION

BY MR. PIPES:

Q. And the Kenneth Granviel that we're talking about is the man seated at the end of counsel table in the gray coat today?

A. Yes.

MR. PIPES: We'll pass the witness.

MR. HILL: (nods)

THE COURT: All right.

You may step down, Mr. Millerd. Thank you.

(Witness resumes his place

Appendix F

in bar area)

MR. FIPES: Your Honor, the State would rest.

THE COURT: Does the defense wish to present evidence?

MR. HILL: Yes, Your Honor. We have some subpoenas issued and we need to check on those if we may.

We have one witness in the hallway I'll check on real quick and we might be able to go with him.

THE COURT: All right.

We'll just be at ease and you can check on that.

(court at ease)

THE COURT: Raise your right hand, please, sir.

Do you solemnly swear the testimony you're about to give in the trial of this case will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes, sir.

THE COURT: Be seated, please.

DEFENDANT'S DIRECT EVIDENCE

Whereupon,

J. L. BLOCKER

having been called as a witness on behalf of the defendant,

having been called as a witness on behalf of the defendant, was duly sworn and testified as follows:

VOIR DIRE EXAMINATION

BY MR. HILL:

Q. Would you state your name, please?

A. Tom Steinmeyer.

Q. Mr. Steinmeyer, where do you reside?

A. Arlington, Texas.

Q. And what is your occupation or employment?

A. I'm a candidate for a masters degree in criminal justice at the University of Texas at Arlington.

Q. When you say a candidate for a masters degree in criminal justice, can you explain for the purpose of the record in more details what that means?

A. I'm involved in the masters degree program to obtain my master of arts, having completed approximately 21 hours of research and study in the criminal justice field.

Q. All right, sir, and you have an undergraduate degree, I take it?

A. Yes, sir, bachelor of science in criminal justice.

Q. Where did you receive that degree?

A. University of Texas at Arlington.

Q. How many hours do you have towards your masters degree?

A. Approximately 21.

Q. Mr. Steinmeyer, did I at some point in the past contact you and request that you and -- involve yourself in a statistical analysis of the -- to determine whether or not the execution of Charlie Brooks on December the 7th, 1982, served as a deterrent effect to any filings of any types of capital murder cases or murder cases subsequent to that time?

A. Yes, sir, you did.

Q. And did you perform that statistical study?

A. Yes, sir, I did.

Q. Can you relate to the Court what you did in performing that study?

A. From the very beginning?

Q. Yes.

A. Well, first we -- it was necessary to define the important periods, controlled period to measure against, and then an experimental period. We chose as an experimental period obviously the period of time of the Brooks' execution, choosing November 1st, 1982, through February 28, 1983, as the experimental period. That was done for a number of reasons, the main one was that the publicity of the impending execution began in November, in late November and lasted up through probably the middle of January, sometime after the execution.

We then included the entire month of November and into the month of February, and there's kind of a balance to make

sure there was no short-term fluctuation in the rate so we would have a sufficient period of time to analyze.

Then we chose the same period in an effort to keep the independent variables at a minimum, we chose the same period of the preceding year by which to measure it against as a control period.

The data was collected from Tarrant, Dallas and Harris Counties ---

Q. What sources at these counties?

A. Utilizing Grand Jury reports out of these counties and comparing them with secondary sources from police reports and uniform crime reporting systems and the Texas Department of Public Safety.

Q. Did you make all of those comparisons yourself?

A. Yes, sir, I did.

Q. And you went to Harris County, you went to Dallas County and here in Tarrant County?

A. Yes, sir.

Q. All right.

After you did that what did you do?

A. Applied a number of statistical techniques to it -- to the data to measure whether or not there was a deterrent effect, a measurable effect or whether -- basically attempting to prove either the hypothesis or the alternate hypothesis.

Q. Being what?

A. The alternate hypothesis, was a non-directional hypothesis which stated there was no significant change in the rate of capital murder in -- between the controlled period and the experimental period, and the alternate hypothesis was there was a significant change in the rate.

Q. What did your statistical analysis or this matter result in?

A. Using the Sanders A Statistic to compare the means of the data from the two periods, it was evident there was no significant rate change over that time.

Q. When you say rate change, what are you referring to?

A. Well, rates and frequencies differ. A rate is -- is a comparison, a frequency. You can have 31 capital murder -- Harris County had 31 capital murders, I think, in the experimental period or in the control period of time. Those are frequency, but once you begin to break that data down and compare it month-by-month, they become rates, and so there was no measurable, statistically measurable deterrent effect of the Brooks' execution by a comparison of the rates.

MR. HILL: Pass the witness.

VOIR DIRE EXAMINATION

BY MR. BAYS:

Q. How did you spell your last name?

A. S-T-E-I-N-M-E-Y-E-R.

Q. Steinmeyer?

A. Yes, sir.

Q. All right.

Mr. Steinmeyer, you say you're working on your masters degree ---

A. Yes, sir.

Q. --- in criminal justice?

What undergraduate math courses did you take?

A. I had twelve hours of college algebra and geometry.

Q. Probability and statistics?

A. Not as a math course, but as a crim ---

Q. Game theory?

A. No, sir.

Q. Qualitative analysis.

A. Yes, sir.

Q. You had qualitative analysis?

A. As an undergraduate. It was a portion of the undergraduate program for criminal justice.

Q. Was it actually in the -- taught in the math department?

A. No, it was taught out of the criminal justice statistics department.

Q. Okay. You mentioned the mean of -- are you

Q. What is that?

A. Which one? The A Statistic?

Q. Yes.

A. The A Statistic takes the difference between the means for the experimental period and control period and there are a number of givens in it. You calculate the degrees of freedom and then you choose a level of significance, and Sandler, who developed the A Statistic, gives you a number of givens called a critical value, and once you perform your calculations, if your -- if the answer that you come up with exceeds the critical value, you fail to reject the null hypothesis.

Q. And as the statistical base, I believe you said you did studies in Dallas, Tarrant and Harris County?

A. Yes, sir.

Q. Why did you select those three counties?

A. Those three counties were selected for a -- a number of different reasons.

One is they were easily accessible; two was I thought they presented a fair representation of the State as a whole.

Q. Oh, you did?

A. Yes, sir.

Of the major population areas.

Q. Would your statistics indicate what effect Charlie Brooks' execution had in Goluthwaite?

talking about the mean as we know that term with relationship to a bell curve?

A. Yes, sir.

Q. What is a bell curve?

A. A bell curve?

A bell curve is a disnormal distribution of frequency occurrences, I guess would be the best way to put it. A bell curve is -- is the most perfect that you -- distribution that you can get.

Q. It is?

What is a standard deviation and how is that term related to a bell curve?

A. Standard deviation is a deviation from the mean. Once the mean is calculated, you take the standard deviation through a statistical formula derived from the variance and the mean and it shows the number of deviations from the mean throughout the distribution, plus or minus one standard deviation, and a bell curve, I believe 68% of the entire population in it ---

Q. Of the sample data?

A. Of the sample.

Q. Okay, and this is the technique you used to arrive at your findings?

A. No, sir. I utilized Sanglers A Statistic, which is derived from the students, the distribution formula.

A. I couldn't say that, no, sir. It's possible that it does.

Q. Pflugerville?

A. Anything's possible.

Q. Munday, Texas?

A. Anything's possible.

Q. Avia?

A. Anything's possible.

Q. Okay, but in fact you went to the major metropolitan areas where the District Attorney's offices are more sophisticated; am I correct about that?

A. That's true.

Q. All right, and it's been your experience, I take it, in the criminal justice area that the more sophisticated offices are more inclined -- have the manpower and the expertise and the experience to not only seek capital murder indictments, but also prosecute them?

A. That has been my general experience. There are some exceptions to that, yes.

Q. Well, as a general proposition wouldn't you say that the District Attorney in a smaller town or three-county district, that sort of thing is -- is less reluctant, or more reluctant, I should say, to seek a capital murder indictment because of the expense and the complicated nature of the case and that sort of thing?

MR. HILL: Your Honor, we're going to object to -- unless counsel can show he has some type expertise in the functioning and workings of small county and District Attorney's offices.

THE COURT: Overrule the objection.

You may answer the question, Mr. Steinmeyer.

THE WITNESS: Can you repeat the question?

BY MR. BAYS:

Q. Yes.

My question is: What is -- let me pose it this way or put it this way: What, if anything, would you -- differences in the -- the way capital murder cases are handled by the justice -- by District Attorney's offices, what, if any, differences, would you expect to see between large metropolitan areas and smaller outlying communities?

A. I really couldn't answer that. I have spent a number of hours contemplating why certain District Attorney's do certain things, and I can come up with no logical answer from any of them.

Q. Well, my question is this: You pick as your statistical base the three largest or actually the two largest metropolitan areas in Texas?

A. Yes, sir.

Q. The metroplex area and the Harris County area?

A. Yes, sir.

Q. You don't go to Beaumont; you don't go to Lufkin; you don't go to Lubbock; you don't go to El Paso; Amarillo; any of the other places to measure the effect of the capital murder -- of Charlie Brooks' execution, and I want to know if you did that, why you did that and why you think it's statistically valid?

A. You want to know why I chose those two areas?

Q. Right.

A. I explained that in the beginning I chose those areas because I felt they were representative of the majority of the State of Texas, the urban populations in the State of Texas.

Q. I'm sorry. I missed that answer.

A. I felt that those three cities, three counties were more representative of the major urban areas in the State of Texas than any other three.

Q. All right, okay, but not -- not the major areas of Texas.

They are all different areas of Texas.

A. Certainly there are. Different areas in any state.

Q. Well, isn't it a fact that you went to Dallas, Tarrant and Harris County because the records are easier to get to?

A. No. That had very little to do with it

(inaudible) records in Dallas County were almost impossible to get to.

Q. Well, but Dallas is easy to get to from Arlington, isn't it?

A. Certainly. I'm not denying the fact that part of it had to do with cost and part of it had to do with transportation.

Q. Okay, so your -- your tests don't indicate how the -- if they indicate anything, they certainly don't indicate how Charlie Brooks' execution, what effect it may have had any other place except those two large urban areas?

A. I have never claimed that it has, no, sir.

Q. All right.

How would the -- your -- the -- the statistics you compiled be affected if instead of just Charlie Brooks being executed, all 164 inmates on death row were executed?

A. I have no idea. You would have to execute 164 people on death row and then hire me to do a study for you and then I would be able to tell you.

Q. Wouldn't you consider that to be a more valid study?

A. Not necessarily.

Q. Why not?

A. I would have to -- before I could say that -- that it would be a more valid study I would have to look at

the type of data you plan to use, the type of formulas you plan to use, utilizing mine -- the formulas that I used and -- and everything that I did, that would probably be a more valid study.

I don't think you would have to kill 164 of them.

Q. You're not -- this is my last question: We're talking about what effect carrying out the death penalty has on the criminal population in Texas?

A. Okay.

Q. And your statistics are based on one isolated execution?

A. That's true.

Q. Don't you think your statistics might change if everyone who's serving under a judgment of death on ex -- on death row at Huntsville were executed?

A. The numbers would obviously change. I don't know if the result would or not.

MR. BAYS: That's all the questions we have.

REDIRECT EXAMINATION

BY MR. HILL:

Q. There was a large amount of publicity disseminated to the general public after the Charlie Brooks and before the Charlie Brooks' execution; is that correct?

A. Tremendous amount.

Q. And because that was the first one in a number of

years?

A. Right.

Q. Would you think that the amount of publicity being disseminated would increase or decrease if more people were being executed?

A. In my personal opinion it would decrease.

Q. And in the wake of the first execution in Texas in a number of years and the publicity in the wake of that, you would -- would you think it would be at its highest amount of publicity immediately following the excution?

A. Yes.

Q. And do you feel like the deterrent effect would be at its highest when it was getting the most exposure and media coverage?

A. I would assume that.

Q. And yet you found no appreciable effect; is that correct?

A. Right.

MR. HILL: That's all I have, Your Honor.

RECROSS EXAMINATION

BY MR. BAYS:

Q. You know -- just one other question.

Of course, a lot of these capital murders are homicides committed during the -- during armed robberies, aren't they?

A. I don't know.

Q. You don't know?
A. I could venture a guess and say probably.
Q. Disproportionate number, wouldn't you think?
A. I don't know.
Q. Okay. Does your -- does your statistical data take into account the economic conditions in this country and particularly in Harris County?
A. We held those as ---
Q. Constants?
A. --- constant as possible by utilizing the same time period, just a year before.
Q. Un-hun, but in that -- in that time period in that year before can you tell me how many people moved from Michigan to Houston?
A. No, sir, I can't.
Q. How many people are living on the side of the road trying to find a job?
A. No, sir, I can't.
Q. How many people might in desperation, if you will, go in and rob a place and shoot somebody?
A. I couldn't even venture a guess.
Q. So you didn't attempt to break down what the capital murders were?
A. That's not for me to judge what a capital murder is. That's for the Grand Jury to judge.

MR. BAYS: That's all we have.
MR. HILL: That's all I have, Your Honor.
THE COURT: All right.
You may step down, Mr. Steinmeyer.
(witness excused)
THE COURT: What's the State's position with regard to the testimony; Mr. Pipes?
MR. PIPES: Well, Your Honor, it's still that the jury is not here to decide the merits of capital murder. The jury is here to decide whether the death penalty is appropriate for this man on what he did. These statistics do not tend to show the effect or the deterrent effect of capital -- or a (sic) execution on murder/rape. The major statistics according to the witness is that it relates to all capital murders and or capital offenses and majority of those capital offenses are murder/robbery; therefore, we would -- would suggest, number one, that the statistical data is inadequate; number two, it's not relevant to the issue that this jury has to decide; number three, the only issue as to the death penalty is for the -- that -- that is called on by statute for the jury to be able to listen to is to whether or not capital murder is appropriate in this -- I mean, capital

punishment is appropriate in this instance, and we would -- we would object to this kind of evidence as not being admissible and it does not relate to this defendant.

THE COURT: Defense position, Mr. Hill?

MR. HILL: Your Honor, my only comment and reply is that we feel like we should be entitled to support arguments against the death penalty and against the death sentence with evidence.

THE COURT: All right.

Regarding the testimony now in the record outside the presence of the jury given by the witness Thomas (sic), the Court is of the opinion that the State's position is well taken in this case, and in the charge in this case, this jury is not going to be called upon to delve into the sociological roles or the efficacy that a death sentence judgment will have. Jury's going to be called on to answer two questions based on the evidence that it hears in this case: Number one, whether or not the defendant deliberately caused the death of the deceased, in essence paraphrasing; and secondly, whether or not the -- there is a probability that the defendant would commit future acts of criminal violence,

neither of which questions can I see how in the world this testimony would aid the jury in determining.

That being the case, the Court is of the opinion that State's motion to quash the testimony of Mr. Steinmeyer is well taken and so orders.

MR. HILL: We object to that and we would reoffer his testimony, Your Honor, in the form of -- as far as the jury's consideration in mitigation of punishment.

THE COURT: Yes, sir, and that offer would be denied.

MR. HILL: We object to the Court's ruling.

THE COURT: The objection is overruled.

Are there any other matters we need to take up outside the presence of this jury?

MR. PIPES: Not that we are aware of, Your Honor.

THE COURT: Are you now ready the the proceed?

MR. HILL: Yes, Your Honor.

THE COURT: Let's have the jury in, please.

(jury present)

THE COURT: Thank you, ladies and gentlemen. We are now ready to proceed.

You may call your next witness.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NO. _____

KENNETH GRANVIEL,
Petitioner

vs.

THE STATE OF TEXAS
Respondent

FILING STATEMENT

THE STATE OF TEXAS

COUNTY OF TARRANT

BEFORE ME, the undersigned authority, on this day personally appeared DANNY D. BURNS, a person known to me who being first duly sworn did state:

"My name is DANNY D. BURNS. I am a member of the Bar of the Supreme Court of the United States and am counsel of record for the Petitioner in the above entitled and numbered cause. I have personal knowledge that the Petitioner's Writ of Certiorari for the above case was deposited with the U.S. Postoffice, 251 West Lancaster, Fort Worth, Texas 76101. The Writ of Certiorari was mailed to Alexander L. Stevas, Clerk of the Supreme Court of the United States, No. 1 First Street N.E. Washington, D.C. 20543."

Danny D. Burns

DANNY D. BURNS
115 North Henderson St.
Fort Worth, Texas 76102
State Bar No. 03443800
(817) 870-1544
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority on this the 27th day of December, 1989.

Carol Watson

NOTARY PUBLIC in and for the
State of Texas

My Commission Expires: 3/14/92

CAROL WATSON

ORIGINAL

Supreme Court, U.S.
FILED
MAR 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-6484

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

KENNETH GRANVIEL,

Petitioner,

v.

**JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,**

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. MAY THE STATE CONSTITUTIONALLY DEPRIVE AN ACCUSED OF THE OPPORTUNITY TO PRESENT MITIGATING EVIDENCE REBUTTING THE STATE'S ARGUMENT THAT THE DEATH PENALTY IS A DETERRENT TO CRIME IN ORDER TO CONVINCE THE JURY THAT THE DEATH PENALTY IS NOT APPROPRIATE AS APPLIED TO THIS PARTICULAR ACCUSED?

II. MAY THE PRESUMPTION OF CORRECTNESS BE APPLIED TO A TRIAL COURT'S DECISION TO EXCUSE A POTENTIAL JUROR IN ORDER TO AVOID AN INDEPENDENT ANALYSIS BY THE COURT OF APPEALS WHEN AN IMPROPER STANDARD HAS BEEN APPLIED BY THE TRIAL COURT?

III. MAY THE STATE REQUIRE AN INDIGENT DEFENDANT TO GIVE A COPY OF A PSYCHIATRIC EXAMINATION BUT NOT A NON-INDIGENT IN ORDER TO GET THE COURT-APPOINTED PSYCHIATRIST PAID FOR HIS SERVICES?

IV. MAY THE STATE CONSTITUTIONALLY ADMIT THE TESTIMONY OF THE SUPERVISING BAILIFFS REGARDING ACTIONS THEY OBSERVED BETWEEN DEFENSE ATTORNEYS AND CLIENT DURING PRIVATE CONSULTATIONS?

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NO. 89-6484

IN THE

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OCTOBER TERM, 1989

KENNETH GRANVIEL,

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v.

**JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,**

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein,[1] by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

[1]For clarity, Petitioner is referred to as "Granviel," and Respondent is referred to as "the state."

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the denial of habeas corpus relief on August 28, 1989. **Granviel v. Lynaugh,** 881 F.2d 185 (5th Cir. 1989). Rehearing was denied on September 28, 1989.

JURISDICTION

Granviel seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Granviel bases his claims upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Also implicated is Article 46.02 §3(d) of the Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

The state has lawful custody of Granviel pursuant to a judgment and sentence of the 213th District Court of Tarrant County, Texas, in Cause No. 193760R, styled **The State of Texas v. Kenneth Granviel.** On July 2, 1982, Granviel was indicted for the offense of capital murder of Natasha McClendon, while in the course of committing and attempting to commit the offense of aggravated rape, to which he entered a plea of not guilty.

Granviel was found competent to stand trial by a jury on February 22, 1983. Jury selection began on March 14, 1983, and trial began on April 26, 1983. On May 5, 1983, the jury found Granviel guilty of the capital offense. After a punishment hearing, the jury answered affirmatively the special issues submitted and he was sentenced to death pursuant to Tex. Code

Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1990). Granviel appealed to the Court of Criminal Appeals of Texas, which affirmed on July 2, 1986. **Granviel v. State,** 723 S.W.2d 141 (Tex. Crim. App. 1986).

The trial court delayed until March 27, 1987, before scheduling Granviel's execution for May 27, 1987. On May 12, 1987, Granviel filed an application for writ of habeas corpus in the state trial court. On May 21, the court conducted an evidentiary hearing on his claim that he was presently insane and incompetent to be executed. After the hearing, the court made findings of fact and conclusions of law and recommended that relief be denied.

On May 20, 1987, Granviel filed a petition for writ of certiorari. The Court granted a stay of execution pending disposition of the petition. On October 5, 1987, the Court denied the petition. **Granviel v. Texas,** 484 U.S. 872 (1987).

Because Granviel's petition for writ of certiorari was pending in this Court when his state writ application came before the Texas Court of Criminal Appeals, that court took no action on the application. After the petition for writ of certiorari was denied, the trial court rescheduled Granviel's execution for December 10, 1987. On December 4, 1987, Granviel filed a motion to have the Court of Criminal Appeals reinstate his application. On the same day, the court reinstated the application, denied relief, and denied a stay of execution.

On December 7, 1987, Granviel filed a petition for writ of habeas corpus and application for stay of execution in the United

States District Court for the Northern District of Texas, Fort Worth Division. The court granted a stay of execution on December 8, 1987. The United States magistrate to whom the case was assigned, after holding an evidentiary hearing, issued his Findings, Conclusions, and Recommendation, recommending that relief be denied. The district court thereafter denied relief and dismissed the petition. The Court of Appeals for the Fifth Circuit affirmed on August 28, 1989, **Granviel v. Lynaugh,** 881 F.2d 185 (5th Cir. 1989), and denied rehearing on September 28, 1989.

STATEMENT OF FACTS

Laura McClendon and her son, Steven, and Martha McClendon and her daughter, Natasha, lived in apartment number 1234 in the Riverside Village Apartments in Fort Worth, Tarrant County, Texas (SF 38: 65-66, 113).[2] On October 8, 1974, Laura, Martha, Steven, Natasha, and Linda McClendon, Laura's and Martha's cousin, were found murdered in the apartment (SF 38: 78-80). The bodies of Laura, Martha, and Linda were partially nude when found (SX 2,4,5,19).

An autopsy on Laura McClendon revealed that she had been stabbed a total of seven times in the chest, back, and legs. Her mouth was extended, indicating there had been a gag-like material

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[2]"SF" refers to the statement of facts from Granviel's trial, followed by the volume and page numbers. "SX" refers to the state's exhibits offered at the trial, followed by the exhibit number.

in her mouth. There was also a superficial abrasion of the neck, which was consistent with that which would be made by a ligature. A vaginal smear revealed the presence of spermatazoa, indicating that there had been sexual intercourse and ejaculation within several hours prior to her death (SF 40: 563-67; SX 103).

An autopsy on Martha McClendon revealed that she had suffered a total of fifteen stab wounds to the chest, abdomen, back, and legs. One of the wounds severed the heart, causing massive bleeding into the pericardial sac. Her mouth was also enlarged, indicating there had been gag-like material in her mouth (SF 40: 560-63; SX 102).

The autopsy on Linda McClendon revealed a total of twenty-two stab wounds, nineteen of which were in a relatively small area of the upper chest. Each of those nineteen wounds penetrated deeply into the chest cavity. There were two superficial wounds on the abdomen and a laceration approximately one-half inch long on the left labium of the vagina. There was what appeared to be a ligature impression around the neck and a fracture of some of the structures of the larynx and voice box, indicating strangulation (SF 40: 556-60; SX 101).

Steven McClendon's autopsy revealed that he had been stabbed a total of five times in the chest. Two of the wounds penetrated the heart, causing massive bleeding into the pericardial sac. Two other wounds penetrated part of the liver (SF 40: 552-56; SX 100).

The autopsy performed on Natasha McClendon revealed nine stab wounds to the chest and back. One of the wounds was above

her right clavicle and penetrated her chest cavity, severing all major arteries underneath and causing massive bleeding into the chest cavity (SF 40: 546-55; SX 99).

In each case the cause of death was the stab wounds, which were consistent with being inflicted with a knife. There was also evidence of strangulation as a contributing cause in some of the deaths (SF 40: 568-69).

On February 8, 1975, Kenneth Granviel turned himself in to the police and confessed to killing the McClendons at the Riverside Village Apartments (SF 40: 582, 588; SF 41: 683-91). Granviel gave a written statement to the police, detailing the events of the evening of October 7, 1974 (SX 104). According to that statement, Granviel had driven to the McClendon's apartment and had seen Laura McClendon through the window. He went to the apartment, knocked on the door, and was invited in (SF 41: 685). Soon after entering the apartment, Granviel went into the kitchen where Laura was, took a knife out of his pocket, and put it to her throat (SF 41: 686). He took Laura and two-year-old Steven, who was also in the kitchen, to the front bedroom, locking the apartment door and closing the curtains on the way (SF 41: 686). He had Laura tie Steven up with a telephone cord and then tied and gagged Laura with strips of a sheet from her bed (SF 41: 686-87).

At about that time, Martha, Linda, and Natasha entered the apartment. Linda came into the bedroom and Granviel showed her the knife and told her to lie down on the bed next to Laura (SF 41: 687). He then went to the living room where Martha was, put

the knife to her throat, and took her to the back bedroom, where he tied her up with strips of sheets (SF 41: 687-88). Granviel then dragged Martha to the front bedroom and finally tied up Natasha as well (SF 41: 688).

After moving his car away from the apartment, Granviel returned to the apartment and dragged Laura to the back bedroom. He pulled her pants down to her ankles and began to cut her panties off with his knife. The knife slipped and he cut the inside of her thigh. Granviel eventually raped Laura (SF 41: 688-89).

Steven began crying at this point, so Granviel returned to the front bedroom and stabbed him several times. While Granviel was stabbing Steven, the handle of the knife broke off. Granviel removed the blade from Steven's body and threw it in the kitchen sink. He threw the handle in a trash can and got another knife from the kitchen (SF 41: 689).

Soon thereafter, Granviel took Martha to the back bedroom and laid her across the bed. He undressed her but she would not spread her legs, so he cut her with the knife. He then raped her (SF 41: 689).

Granviel returned to the front bedroom to get Linda. He had tied something around her neck, however, and she was not breathing (SF 41: 689-90). Granviel then stabbed Linda numerous times. Natasha, who was on the floor in the front bedroom, started screaming, so Granviel kicked her and then stabbed her (SF 41: 690).

Next, Granviel returned to the back bedroom and, after talking to Laura for a time, stabbed Martha several times (SF 41: 690). He then stabbed Laura in the back and chest. He asked her if she was dead and, when she answered no, he stabbed her several more times (SF 41: 690). Finally, Granviel went through the women's purses, took their money, and left the apartment (SF 41: 690-91).

After completing his statement, Granviel confessed to two other killings and several rapes that he had committed earlier in the evening of February 8, 1975, prior to turning himself in. Granviel had mentioned the murders when he first arrived at the police station and, as a result, he and several officers went to his apartment at 1802 Roberts in Fort Worth (SF 41: 707). Granviel directed the police to the apartment and gave them a key to get in (SF 41: 707). Two detectives entered the apartments and found the bodies of two females -- Betty Williams and Vera Hill (SF 41: 707, 740). In a written statement (SX 107), Granviel gave police a detailed account of the events of the evening of February 8, 1975.

Granviel had been at his home watching television when Betty Williams knocked on the door. He let her in and Williams used the phone to make several calls. She asked if Granviel had a pack of cigarettes that belonged to a friend of theirs, and Granviel threw her a half a pack he had in his pocket (SF 41: 716). As Williams got up to leave, Granviel suggested that she get a whole pack of cigarettes out of a dresser drawer in his bedroom. He followed her into the bedroom, grabbed her from

behind, and "turned her on her head" (SF 41: 716). He removed her pants but then heard Vera Hill, his common-law wife, unlocking the front door (SF 41: 717, 751). Granviel then got a knife from the kitchen and stabbed Hill in the chest, back, and stomach once she was in the apartment (SF 41: 717).

He returned to the bedroom and was about to rape Williams when he was interrupted by a knock at the door. He got rid of the visitor and then dragged Hill's body into the kitchen (SF 41: 717). He went back to bedroom and this time raped Williams. When someone again knocked on the door, he tried to keep Williams quiet by "wrapping her chin and neck around the bedpost." He then stabbed Williams repeatedly in the side, chest, and back (SF 41: 717-18). Later, as Granviel was changing clothes, Williams was still alive and making noises. He went to the kitchen and got a claw hammer and hit Williams twice on the right side of the head and temple (SF 41: 718).

After this, Granviel left the apartment and drove around for awhile. He eventually ended up at Wanda Hanson's house (SF 41: 718-19). He knocked on the door and asked Lizzie Phillips, Wanda's mother, if Wanda still lived there and was home (SF 41: 719; SF 43 1076). When Phillips told him that Wanda was not home, Granviel asked to use the phone. Phillips let him in but, instead of making a call, Granviel pulled a knife on her (SF 41: 719; SF 43: 1077-78). He told Phillips not to say anything and he would not hurt her (SF 43: 1078). Granviel then took Phillips and her two grandchildren to the bedroom and tied them up (SF 41: 719; SF 43: 1080-81).

Granviel removed Phillips' pants and underwear and began to rape her (SF 41: 720; SF 43: 1081, 1084). Before he finished, however, someone knocked on the front door. He got a gun which belonged to Phillips and went to answer the door. He let Janet Craney, Wanda's sister, in, put the gun to the back of her head and took her to the bedroom where Phillips and the two children were (SF 41: 720; SF 43: 1084-86). He then put Craney and the two children in the bathroom. He returned to the bedroom and raped Phillips, then took her to the living room and continued to have sexual intercourse with her (SF 41: 720; SF 43: 1088-90).

Soon, there was another knock at the door. Granviel opened the door and let Dwight Craney, Janet's husband, into the apartment. He put the gun to the back of Craney's head and then put him in a closet (SF 41: 720; SF 43: 1090-91). Granviel then took Phillips back to the bedroom (SF 41: 720-21; SF 43: 1091).

About that time, Wanda came home and entered the apartment. Granviel put his pants on and waited for her to come down the hall (SF 41: 721; SF 43: 1093). As she passed where he was standing he grabbed her and pointed the gun at a man who had come in with her (SF 41: 721; SF 43: 1093). He eventually left the house, taking Wanda with him, and returned to his apartment (SF 41: 721; SF 43: 1098). Granviel then raped Wanda (SF 41: 722).

Later that evening, Granviel called his pastor, Reverend Spearman, and asked him to with Granviel to the police station (SF 41: 723; SF 40: 582). Granviel took Wanda to pick up Reverend Spearman and then drove to the police station. He told Wanda to drive his car and give it to a friend (SF 40: 585). At the

police station, Granviel gave two written statements, confessing to a total of seven murders and five rapes. As a result of these confessions, Granviel was indicted on one count of capital murder and a second count of murder.

At trial, the court conducted a **Jackson v. Denno**[3] hearing outside the presence of the jury and concluded that the confessions were freely, voluntarily, intelligently, and knowingly given and were therefore admissible into evidence (SF 40: 527).

Granviel's defense was based on a claim that he was legally insane at the time he committed the offenses. In support of the plea, the defense presented the testimony of a psychologist and a psychiatrist who, based on interviews with Granviel or hypothetical questions, concluded that at the time of the murders, Granviel was probably suffering from paranoid schizophrenia that prevented him from conforming his conduct to the requirements of the law (SF 42: 879-915; SF 43: 959-991; SF 44: 1261-78; SF 45: 1360-76). The defense also presented testimony concerning Granviel's youth. His mother, Willie Lee Jones, testified that Granviel set fires in their house three times when he was a child, the third fire resulting in nearly total destruction of the inside of their home (SF 41: 807-10). There was also testimony that at one time Granviel had tried to sexually molest his younger brother (SF 42: 851). Mrs. Jones also testified that

[3]378 U.S. 368 (1964).

when he was sixteen, Granviel assaulted her and tried to rape her. As a result of that incident, Granviel was sent to the state reform school at Gatesville (SF 41: 823-33).

In response to this evidence, the state presented the testimony of two psychiatrists who, based either on interviews with Granviel or hypothetical questions, concluded Granviel was not suffering from a major mental illness, but instead had an antisocial personality. Both concluded that Granviel knew right from wrong and could conform his behavior to the requirements of the law (SF 43: 1114-1124; 1124-1149; 44: 1218-1247). The jury found that Granviel was sane at the time of the offense for which he was indicted, and that he was guilty of capital murder as charged in the indictment.

At the punishment phase of the trial, the jury considered all the evidence set forth during the guilt-innocence stage of the trial. The jury also heard testimony concerning Granviel's behavior while in jail, which was generally favorable to the defendant (SF 46: 1629-1671). The state presented testimony concerning two incidents, one where Granviel slapped one of his defense attorneys and one where Granviel reached through cell bars and grabbed his other defense attorney by the tie (SF 46: 1609-1629). The jury answered the two special punishment issues affirmatively, and Granviel was sentenced to death.

SUMMARY OF ARGUMENT

The petition presents no special or important reasons for the Court to exercise its certiorari jurisdiction.

The court below correctly held that there was no constitutional violation in the trial court's exclusion of testimony that the death penalty does not deter crime. Such evidence is not an aspect of the defendant's character or background, or a circumstance of the offense demonstrating a reduced personal culpability. Thus a trial court may properly preclude the defendant from introducing or the sentencer from considering such evidence.

The court of appeals was correct in employing the test set out in **Adams v. Texas** and **Wainwright v. Witt** in determining whether venire members were properly excluded for cause due to their beliefs about capital punishment. Appellate courts are to apply the law as it exists at the time the case comes before it. Here, venireman Curry demonstrated by his answers to **voir dire** questions that serving on the jury would put in such a dilemma that the trial court was justified in concluding that he would be unable to faithfully carry out his duties as a juror. The court below accorded this finding the presumption of correctness required by 28 U.S.C. §2254(d).

Granviel was not denied due process when the trial court appointed the psychiatrist who had examined Granviel at his attorneys' request as a disinterested expert and made his report available to the state. Granviel had the services of both a psychologist and a psychiatrist who examined him before his

second trial and testified that in their opinion he was suffering from paranoid schizophrenia and was insane at the time of the offense. The fact that the state had access to a contrary conclusion from a psychiatrist who examined Granviel at his request did not prevent Granviel from investigating and presenting his insanity defense.

There was neither a due process violation nor a violation of the attorney-client privilege when two court bailiffs were allowed to testify at the punishment phase about two incidents of violence they had observed while Granviel was meeting with his attorneys. There was no showing that the bailiffs had the kind of close and continual association with the jury that would render their testimony inadmissible, and their testimony in any event could not have had a significant impact on the jury. It was formal and factual and was cumulative of other, much more serious, evidence of Granviel's violent nature. In addition, the incidents did not occur during privileged communications made for the purpose of obtaining legal advice, and did not reveal the content of any communication between Granviel and his attorneys. Thus, there was no breach of the attorney-client privilege.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of

judicial discretion, and will be granted only when there are special and important reasons therefor. Granviel has advanced no special or important reason in this case, and none exists. His claims involve only the application of settled principles of law to undisputed fact situations, so there is no important question of law to be resolved.

II.

THE STATE MAY PROPERLY EXCLUDE AS IRRELEVANT EVIDENCE THAT THE DEATH PENALTY IS NOT A DETERRENT TO CRIME.

During the punishment phase of his trial, Granviel attempted to introduce testimony from a doctoral candidate in sociology that the first post-**Furman**[4] execution in Texas had had no deterrent effect on the crime rate.[5] After hearing the testimony outside the presence of the jury, the trial court ruled that it was irrelevant and refused to admit it. Granviel contends that the testimony was mitigating evidence that he had a right to present to the jury and that its exclusion was error under the Eighth Amendment.

Granviel premises his argument on the principle that a sentence is unconstitutionally disproportionate "'if it . . . makes no measurable contribution to acceptable goals of punishment . . . .'" **Lockett v. Ohio,** 438 U.S. 586, 624 (1978)

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[4]**Furman v. Georgia,** 408 U.S. 238 (1972).

[5]The first execution in Texas after **Furman** took place on December 7, 1982. Granviel's second trial was in April and May, 1983.

(White, J., concurring in part and dissenting in part), quoting **Coker v. Georgia,** 433 U.S. 584, 592 (1977). He then notes that one of the stated purposes of the punishments prescribed by the Texas Penal Code is to deter crime. Tex. Penal Code Ann. §1.02 (Vernon 1974). Thus, he concludes, evidence that the death penalty is not a deterrent is relevant to the jury's sentencing decision and cannot be excluded from its consideration.

Granviel's contention misconstrues this Court's holdings regarding the nature of mitigating evidence at the sentencing phase of a capital murder trial. In **Furman v. Georgia,** 408 U.S. 238 (1972), the Court held that the death penalty, as then applied, was violative of the Eighth and Fourteenth Amendments because it was imposed without sufficient guidance to the sentencing authority. Four years later, North Carolina's mandatory death penalty statute was found to be invalid because it did not permit the sentencer to consider the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty." **Woodson v. North Carolina,** 428 U.S. 280, 303 (1976). The Court has since held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, **as a mitigating factor,** any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." **Lockett v. Ohio,** 438 U.S. at 604 (emphasis in original) (footnote omitted). The holding recognized that the punishment

hearing must focus the sentencer's attention on the defendant before it and the nature of the particular crime for which the death sentence is being sought.

The Court went on to note that trial courts were not limited in their traditional authority to exclude "evidence not bearing on the defendant's character, prior record, or the circumstances of the crime." **Id.** at 604 n.12; **see also Brock v. McCotter,** 781 F.2d 1152, 1158 (5th Cir.) ("where no reasonable person would view a particular fact as mitigating it may properly be excluded as irrelevant."), **cert. denied,** 467 U.S. 1153 (1986). As the court below held, whether capital punishment has value as a deterrent to crime is simply "irrelevant to the defendant or his crime," **Granviel v. Lynaugh,** 881 F.2d at 189, and the exclusion of the evidence is not constitutional error.[6]

III.

THE COURT BELOW EMPLOYED THE CORRECT STANDARD IN CONCLUDING THAT VENIREMAN CURRY WAS PROPERLY EXCLUDED FOR CAUSE FROM GRANVIEL'S JURY.

At trial, the state successfully challenged venire member Edgar Lincoln Curry for cause on the ground that his views on capital punishment prevented him from taking the juror's oath to

[6]Moreover, Granviel does not deny that another "acceptable goal of punishment" is retribution. **Gregg v. Georgia,** 428 U.S. 153, 183-87 (1976); Tex. Penal Code Ann. §1.02 (3) (one of the objectives of the Code is "to prescribe penalties that are proportionate to the seriousness of offenses"). It cannot be gainsaid that the death penalty in this case makes a measureable contribution to the retributive aspect of punishment and, thus, its imposition is not constitutionally disproportionate.

answer the punishment issues based on the evidence presented. The court below reviewed the trial court's action under **Wainwright v. Witt,** 469 U.S. 454 (1985), and **Adams v. Texas,** 448 U.S. 38 (1980), and affirmed. Granviel contends that both the district court and the court of appeals employed an incorrect standard of review because **Witherspoon v. Illinois,** 391 U.S. 510 (1968), was the standard in effect at the time of his trial, and was the standard under which the trial court was operating. Granviel asserts that Curry's responses to **voir dire** questions did not show that he would automatically vote in such a way that a death sentence would not be imposed and that, therefore, under **Witherspoon,** he should not have been excluded for cause.

It is fundamental in the nature of appellate review that courts apply the law as it exists at the time the case comes before them. **Goodman v. Lukens Steel Co.,** ___ U.S. ___, ___, 107 S.Ct. 2617, 1621 (1987); **United States v. Schooner Peggy,** 5 U.S. (1 Cranch) 103, 110 (1801). Accordingly, it was proper for the lower courts to apply to Granviel's case the standard in **Adams,** which was reaffirmed in **Witt** as the correct test for judging the qualification of a venire member with conscientious objections to the death penalty.

Under the **Adams/Witt** standard, the question to be decided is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" **Witt,** 469 U.S. at 424, quoting **Adams v. Texas,** 448 U.S. at 45. This formulation of the rule dispenses with **Witherspoon's** test of "automatic decision making"

and does not require that the juror's bias be proven with "unmistakable clarity." **Witt**, 469 U.S. at 424. In fashioning this rule, the Court went on to observe:

> What common sense should have realized experience has proven; many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear," these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Id. at 424-26 (footnote omitted).

Thus, the Court held that the trial court's determination that a person was not qualified to serve on the jury is a factual finding, entitled to a presumption of correctness under 28 U.S.C. § 2254 in federal habeas corpus proceedings. **Id.** at 429; **see also Patton v. Yount**, 467 U.S. 1025 (1984). This kind of determination is made after **voir dire** examination, during which the trial court has the opportunity to observe the demeanor and hear the responses of the venire member. A finding that the prospective juror is biased rests on the court's assessment of credibility "whose basis cannot be easily discerned from an appellate record." **Witt**, 469 U.S. at 429.

Here, the court below noted that Curry gave facially inconsistent answers to the questions put to him during **voir dire**. He stated initially that he was opposed to the death penalty (SF 16: 852-53), and that he would vote automatically

against the death penalty regardless of what the evidence showed (SF 16: 854). He later retreated from this position and said that if he took the juror's oath he would answer the punishment issues truthfully because he believed strongly in the solemnity of an oath (SF 16: 862). However, because taking the oath would force him to compromise his beliefs, he stated that he would not take the oath (SF 16: 865, 867).

He gave the same kind of responses during questioning by Granviel's attorney, stating that he would not take the juror's oath because to do so could force him to set aside his personal convictions and "I'm not going to set them aside irregardless" (SF 16: 885), while acknowledging that if he took the oath he would answer the punishment issues truthfully (SF 16: 887-88). The trial court eventually took over the questioning, which culminated with the following:

> Q. The question, then, becomes if you were serving on a jury which were to determine those questions and that matter --
>
> A. Uh-huh.
>
> Q. --all I need to know at this point is how strong is that feeling, Reverend? Would you always vote against death or are there circumstances under which you could vote for it if the evidence shows you you should?
>
> A. Irregardless I will not change my position, that I will not want to be in a position to have to decide whether a man would live or die.
>
> Q. All right.
>
> A. And I would vote that he live irregardless to whether the evidence was presented.
>
> Q. Every time?

A. Every time.

(SF 16: 892-93). At this point, the court sustained the state's challenge for cause.

As the court of appeals observed, Curry's beliefs put him on the horns of a serious dilemma. On the one hand, he was morally opposed to capital punishment, and felt that he could not even take part in the process of sentencing someone to death and still be true to his principles; on the other, he felt just as strongly that if he took an oath to do something, he was morally bound to follow it. Although he professed to be able to abide by the terms of the juror's oath, the trial court, hearing his answers and observing his demeanor, certainly was "left with the definite impression that he would not be able to faithfully and impartially apply the law," so that the state's challenge for cause was properly granted. **Granviel v. Lynaugh,** 881 F.2d at 188.

IV.

THE TEXAS PROCEDURE REQUIRING THAT MENTAL HEALTH EXPERTS APPOINTED BY THE COURT AT THE REQUEST OF AN INDIGENT DEFENDANT BE DISINTERESTED EXPERTS WHOSE REPORTS ARE AVAILABLE TO BOTH THE DEFENDANT AND THE STATE DID NOT VIOLATE DUE PROCESS.

Prior to his first trial, Granviel's attorneys arranged for Dr. John Holbrook, a psychiatrist, to examine Granviel for sanity at the time of the offense. After the doctor completed his examinations, Granviel moved to have him appointed by the court so that he could be reimbursed. The trial court entered an order pursuant to Tex. Code Crim. Proc. Ann. art. 46.03, appointing Dr.

Holbrook as a disinterested expert for the court. A copy of his report was given to both the prosecutor and the defense, over Granviel's objection. At trial, Dr. Holbrook testified that, in his opinion, Granviel had been sane at the time he committed the offense. Dr. Holbrook died prior to Granviel's second trial and the state introduced his testimony from the first trial, again over Granviel's objection. Granviel asserts that requiring the psychiatrist appointed at his request to turn over his report to the state violated his right to due process.

In **Ake v. Oklahoma,** 470 U.S. 68 (1985), the Court held that the Fourteenth Amendment requires the state to provide an indigent defendant access to a psychiatrist's assistance when he has made a preliminary showing that his sanity at the time he committed the crime is likely to be a significant factor at trial. The Court took note of the fact that a defendant's mental condition is relevant to the question of his criminal culpability and that, when the defendant raises the question of his sanity, a psychiatrist's knowledge and skill "may well be crucial to the defendant's ability to marshal his defense." **Id.** at 80. Consequently, to ensure a fair and accurate outcome of the criminal proceedings, the state must "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." **Id.** at 83.

Texas law provides that an attorney appointed to represent an indigent defendant shall be reimbursed for reasonable expenses incurred in using expert witnesses, if prior approval is obtained

from the court. Tex. Code Crim. Proc. Ann. art. 26.05(a). Article 46.03 §3(a) of the Code of Criminal Procedure provides that, when notice of intent to raise an insanity defense is given, the court, on its own motion or that of the defendant or his attorney, may appoint a disinterested expert to examine the defendant and testify at trial. His report is to be delivered to the court, which shall furnish copies to the attorneys for both the defense and the state. In this case, Granviel's attorneys had already had Granviel examined when they sought to have Dr. Holbrook appointed (SF 43: 1029-30). Because there had been no prior request for the appointment, the trial court acted under article 46.03 in designating Dr. Holbrook as a disinterested expert.[7]

Granviel can show no violation of his rights by this procedure for the simple reason that he had access to both a psychologist and a psychiatrist to assist him in preparing his insanity defense at his second trial. Dr. Jerold May, PhD, examined Granviel at Dr. Holbrook's request before the first trial. Based on his interviews and the results of a battery of psychological

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[7]Granviel's attorney at his first trial, who had been elected a state district court judge by the time of the second trial, testified that Article 26.05 was available at the time he contacted Dr. Holbrook (SF 43: 1030, 1036-38, 1042), he did not understand that the statute was limited to paying only investigators, but was available to reimburse any expert (SF 43: 1045), and he could have sought prior approval for paying Dr. Holbrook. Granviel does not contend that counsel was ineffective for proceeding as he did in seeking to have Dr. Holbrook appointed as an expert.

tests, Dr. May concluded that Granviel was insane at the time of the offense. Dr. May discussed his findings with counsel representing Granviel at his second trial (SF 43: 954), and testified at the second trial, explaining in detail the methods he employed and the basis for his diagnosis (SF 42: 879-956).

In addition, Dr. Swen Helge, a psychiatrist, observed Granviel interact with his attorney during an interview in the jail (SF 43: 974-75). He later attempted on two occasions to interview Granviel and conduct a series of tests. The first time Granviel refused to see him, and the second he spoke in a "sort of word salad manner," "with words that had some meaning but they weren't associated properly or put together properly" (SF 43: 975-76). Based on his observations and on a hypothetical question put to him by Granviel's attorney, Dr. Helge testified that in his opinion Granviel suffered from a paranoid schizophrenic personality and was legally insane when he committed the crime (SF 43: 990-91). Thus, Granviel had the services of not one but two experts who "conduct[ed] an appropriate examination and assist[ed] in evaluation, preparation, and presentation of the defense." **Ake,** 470 U.S. at 83. The fact that Dr. Holbrook's unfavorable diagnosis was made available to the state placed no limits on Granviel's ability to uncover and present the facts relating to his sanity. Accordingly, there was no due process violation.

V.

GRANVIEL'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN TWO COURT BAILIFFS WERE PERMITTED TO TESTIFY AT THE PUNISHMENT PHASE OF THE TRIAL ABOUT INCIDENTS OF VIOLENCE ON GRANVIEL'S PART THAT THEY WITNESSED DURING CONFERENCES WITH HIS ATTORNEYS.

During the punishment phase, the trial court conducted a hearing outside the presence of the jury to determine whether Basil Honeycutt, one of the court's bailiffs, was competent to testify concerning an incident involving Granviel that occurred in the court's holdover cell during a pretrial hearing (SF 46: 1609-1617). Honeycutt testified that he was employed as a bailiff assigned to the 213th District Court and had been "attending" the jury during the course of the trial (SF 46: 1611).[8] Honeycutt testified that in February of 1983 he witnessed Granviel slap his court-appointed attorney in the face while standing in the holdover cell of the courtroom (SF 46: 1610). He further testified that he never discussed the incident with any member of the jury (SF 46: 1612). Defense counsel asked the court to exclude the testimony asserting: 1) that Honeycutt should be considered an incompetent witness since he had the opportunity to gain the confidence of the members of the jury during his service as bailiff; and 2) that "the court had been informed of the 'alleged occurrence' [only] for the benefit of

[8]He described his duties as taking the sequestered jurors to breakfast and lunch, getting the jurors to the hotel, and making sure the jurors were where they were supposed to be at the appropriate time (SF 46: 1611-12).

the information of the court" (SF 46: 1615). The Court overruled counsel's objections and Honeycutt testified to the same facts before the jury (SF 46: 1617-1620). On cross-examination, Honeycutt testified that Granviel had been a model prisoner and that he had never tried to escape confinement (SF 46: 1620-1621).

Thereafter, the state called Harry Millerd, another bailiff assigned to the court. Defense counsel stated that he wished to raise the same objections as those made to the testimony of Bailiff Honeycutt. The objection was overruled and Millerd testified about an incident he witnessed while looking through a glass window in the door of the holdover room. At some point during a break in the **voir dire**, Granviel reached through the holding room's bars and appearing to be irate, grabbed one of his court-appointed counsel by the tie (SF 46: 1627-11628). Defense counsel's cross-examination consisted of questions clarifying Millerd's testimony as to the area of the body which Millerd saw Granviel grab (SF 46: 1628). Later, when Millerd was called as a witness on behalf of Granviel, he testified that he had never witnessed any type of disturbance or violence between Granviel and any other inmate (SF 46: 1639).

Granviel claims the testimony of the bailiffs was improper for two reasons. First, he asserts the testimony was improper because the bailiffs were "cloaked with the credibility of the Court" and it was thus probable that the jury was improperly influenced by their testimony. Second, he contends the testimony

was improper because it invaded the attorney-client privilege. Both allegations are without merit.

To determine whether the testimony of court officers who have had some contact with the jury should be barred, courts must engage in a two-part analysis. First, there must be some type of close and continual association between the testifying officer and the jurors. **See Turner v. Louisiana,** 379 U.S. 466, 474 (1965). Standing alone, however, such close association is not sufficient to bar testimony. The court must also analyze the "impact the officer's testimony may have had on the jury." In measuring this impact, the court should look to the nature of the testimony and, if the testimony was of more than a formal nature, whether it was corroborated or uncontradicted. **Id.** at 473 (emphasizing that the officer's testimony "was not confined to some uncontroverted or merely formal aspect of the case" but involved key testimony to a finding of guilt or innocence); **see also Jackson v. Beto,** 388 F.2d 409, 411 (5th Cir. 1968) (reading the bar on testimony "as limited by situations in which the jury custodian's testimony was central to the development of the case for the prosecution and in which his contact with the jury was continual and intimate").

Assuming there was sufficient contact with the jury to invoke the concerns set forth in **Turner**, admission of the testimony of Bailiffs Honeycutt and Millerd does not call for the granting of habeas relief. First, it is noted that the two men testified only during the punishment phase of the trial, after Granviel had already been found guilty of capital murder.

Moreover, their testimony, which went uncontradicted, was of a rather formal nature in that the bailiffs merely described events they witnessed; the testimony involved neither a subjective evaluation of the evidence nor an evaluation of Granviel's future dangerousness. The testimony, while relevant to the issue of future dangerousness, concerned minor acts of physical violence against individuals, and placed in comparison to the massive amount of evidence indicating Granviel's dangerous tendencies, cannot be considered to have had an unwarranted impact on the jurors. Thus, in overruling defense counsel's objection, the trial judge did not allow the introduction of the type of key testimony, **Turner v. Louisiana,** 379 U.S. at 473, or "testimony. . .central to the development of the case for the prosecution." **Jackson v. Beto,** 388 F.2d at 411.

Granviel's second basis for challenging the testimony of the two bailiffs is that it invaded the attorney-client privilege. As the court below noted, the privilege is limited to "communications 'made in confidence for the purposes of obtaining legal advice.'" **Granviel v. Lynaugh,** 881 F.2d at 193, quoting **Wells v. Rushing,** 755 F.2d 376, 379 n.2 (5th Cir. 1985); **see Fisher v. United States,** 425 U.S. 391, 403, (1976). This case involves no such attorney-client privilege issue. The bailiffs' testimony did not reveal a confidential communication from Granviel to his court-appointed attorneys made "for the purpose of obtaining legal advice." Rather, it concerned actions by Granviel that the bailiffs witnessed and that were relevant to the issues to be determined by the jury at the punishment

hearing. Granviel has made no showing that actions involving the attorney and client, as opposed to communications between them, is included within the scope of the privilege, nor can he. Such an extension of the attorney-client privilege to cover this kind of interactions would extend the protection outside the logic of the principle. The court below properly rejected Granviel's objections to the bailiffs' testimony as meritless.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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ATTORNEY GENERAL

March 26, 1990

The Honorable Joseph F. Spaniol, Jr.
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: Kenneth Granviel v. James A. Collins,
No. 89-6484

Dear Mr. Spaniol:

Enclosed for filing with the papers in the above styled cause are the original and nine typewritten copies of Respondent's Brief in Opposition. Also enclosed are the Proof of Service and Appearance of Counsel forms.

Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid addressed envelope.

By copy of this letter, one copy of said brief has been sent to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

WILLIAM C. ZAPALAC
Assistant Attorney General
(512) 463-2080

WCZ/kh
Enclosures

cc: Danny D. Burns
115 North Henderson St.
Fort Worth, Texas 76102

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NO. 89-6484

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

KENNETH GRANVIEL,

Petitioner,

v.

**JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,**

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 26th day of March, 1990, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Danny D. Burns, 115 North Henderson St., Fort Worth, Texas 76102. All parties required to be served have been served. I am a member of the Bar of this Court.

WILLIAM C. ZAPALAC
Assistant Attorney General

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ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME this 26th day of March, 1990.

NOTARY PUBLIC, State of Texas

NO. 89-6484

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

KENNETH GRANVIEL,

Petitioner,

v.

**JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,**

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

APPEARANCE OF COUNSEL

The Clerk will enter my appearance as counsel for James A. Collins who in this Court is Respondent. I certify that I am a member of the bar of the Supreme Court of the United States.

WILLIAM C. ZAPALAC
Assistant Attorney General

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ATTORNEY FOR RESPONDENT

SUPREME COURT OF THE UNITED STATES

KENNETH GRANVIEL *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 89-6484. Decided May 29, 1990

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This case raises the question whether an indigent criminal defendant's constitutional right to psychiatric assistance in preparing an insanity defense is satisfied by court appointment of a psychiatrist whose examination report is available to both the defense and prosecution. The Fifth Circuit, on habeas review, held that such an appointment is sufficient. 881 F. 2d 185 (1989). This ruling is squarely inconsistent with our decision in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), that a State must provide an indigent defendant a psychiatrist to assist in preparing and presenting his defense. *Ake* mandates the provision of a psychiatrist who will be part of the defense team and serve the defendant's interests in the context of our adversarial system. To allow the prosecution to enlist the psychiatrist's efforts to help secure the defendant's conviction would deprive an indigent defendant of the protections that our adversarial process affords all other defendants.

Kenneth Granviel was tried for capital murder in 1983. Prior to trial, Granviel requested that the court appoint a mental health expert to help him prepare an insanity defense. He specifically asked that the expert's report not be made available to the prosecution. The trial court denied petitioner's request for confidential expert assistance; it did, however, appoint a disinterested expert whose report would go to both the defense and prosecution, as authorized by Texas Code of Criminal Procedure Article 46.03(3) (Vernon 1979 & Supp. 1990). That statute provides:

"(a) If notice of intention to raise the insanity defense is filed . . . , the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health and mental retardation to examine the defendant with regard to the insanity defense and to testify thereto at any trial or hearing on this issue.

"(b) The court may order any defendant to submit to an examination for the purposes described in this article. . . .

"(c) The court shall advise any expert appointed pursuant to this section of the facts and circumstances of the offense with which the defendant is charged and the elements of the insanity defense.

"(d) A written report of the examination shall be submitted to the court within 30 days of the order of examination, and the court shall furnish copies of the report to the defense counsel and the prosecuting attorney." See also Art. 46.02 (providing for court appointment of expert to determine defendant's competency to stand trial).

Pursuant to this law, the court also allowed the prosecution, over Granviel's objection, to rebut Granviel's evidence of insanity with the report of a psychiatrist appointed at Granviel's request.

In *Ake*, we held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation, and presentation of the defense.*" 470 U. S., at 83 (emphasis added). *Ake* was concerned not with establishing a procedure whereby an independent examiner could determine the validity of a defendant's insanity defense and present his findings to both parties and to the court. Rather, *Ake* was directed at providing a defendant

with the tools necessary to present an effective defense within the context of our adversarial system, in which each party marshals evidence favorable to its side and aggressively challenges the evidence presented by the other side. In that adversarial system, "the psychiatrists for each party enable the [court or] jury to make its most accurate determination of the truth on the issue before them." *Id.*, at 81. Thus, we recognized in *Ake* that a defense psychiatrist is necessary not only to examine a defendant and to present findings to the judge or jury on behalf of the defendant, but also to "assist in preparing the cross-examination of a State's psychiatric witnesses," *id.*, at 82, and in determining "how to interpret their answers," *id.*, at 80. Just as an indigent defendant's right to legal assistance would not be satisfied by a State's provision of a lawyer who, after consulting with the defendant and examining the facts of the case and the applicable law, presented everything he knew about the defendant's guilt to the defendant, prosecution, and the court, so his right to psychiatric assistance is not satisfied by provision of a psychiatrist who must report to both parties and the court.

Ake's requirement of psychiatric assistance does not mean that a defendant can shop around for a psychiatrist "of his personal liking" or "receive funds" from the State to hire a psychiatrist on his own. *Id.*, at 83. The trial court retains the authority to choose the psychiatrist, as long as that psychiatrist is competent. Nevertheless, the function of the psychiatrist chosen by the court is still to assist the defendant in preparing and presenting his defense. Of course, *Ake* does not guarantee a psychiatrist "who will reach biased or only favorable conclusions." *Granviel* v. *Lynaugh*, 881 F. 2d, at 192. If the psychiatrist appointed to assist the defendant determines that the defendant was not insane at the time of the offense, he probably will not be able to provide much helpful testimony for the defense on the insanity issue. But the psychiatrist's determination may not be revealed to the prosecution for use as evidence any more than may the re-

sults of the investigation and research of the defendant's court-appointed lawyer.

Texas' provision of a "disinterested" expert thus does not satisfy *Ake*. Texas may, of course, provide for appointment of such an expert to aid the factfinder in determining the validity of a defendant's insanity defense. Cf. Fed. Rule Evid. 706. Such an appointment, however, must supplement—not take the place of—appointment of a psychiatrist to assist the defendant in preparing and presenting his defense.

Granviel is entitled to a new trial because he was deprived of the assistance required under *Ake*. Furthermore, as this result is dictated by *Ake*, which we decided before petitioner's conviction became final, Granviel's claim is not barred by this Court's decision in *Teague* v. *Lane*, 494 U. S. ——, —— (1989). Because the Fifth Circuit's misinterpretation of *Ake* substantially undermines an indigent defendant's ability to present an effective defense, I would grant the petition to reaffirm our holding in *Ake*. Even if Granviel did not have a meritorious *Ake* claim, I would grant the petition and vacate petitioner's death sentence on the ground that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting).